Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1004

HAROLD EUGENE ROGERS,

Petitioner,

—v.—

THE STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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HAROLD EUGENE ROGERS,

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THE STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Arkansas entered in the above entitled cause on October 21, 1974 and reaffirmed on November 18, 1974 when the Supreme Court of Arkansas denied the Petitioner's Application for Rehearing.

Opinions Below

The opinion of the Supreme Court of Arkansas is reported at 257 Ark. 144, —— S.W. 2d —— (1974).

The decision of the Supreme Court of Arkansas denying the Petitioner's Application for Rehearing is not reported and is printed herein, *infra*, as Appendix A.

Jurisdiction

The judgment of the Supreme Court of Arkansas was entered on October 21, 1974. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3), Petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution and laws of the United States.

Questions Presented

1. Whether the trial court erred in not allowing sufficient voir dire examination by defense counsel on the issue of the racial prejudice of the potential jurors to permit an intelligent exercise of the peremptory challenge.

2. Whether the trial judge exhibited such bias before the panel of the jury and otherwise that it deprived the Petitioner of an impartial trial and due process of law.

3. Whether the sentence of life imprisonment without an opportunity for parole, imposed upon a first offender minor, whose offense resulted in no physical harm to the victim, is so excessive and disproportionate to the illegal act as to constitute cruel and unusual punishment.

Constitutional and Statutory Provisions Involved

1. This case involves the Sixth Amendment to the United States Constitution.

2. This case also involves the Eighth Amendment to the United States Constitution.

3. This case also involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution (Section 2 of the Fourteenth Amendment).

4. This case also involves relevant portions of Act 438 of the Arkansas Legislature (Ark. Stat. § 41-3403, 1973).

5. This case also involves relevant portions of the Arkansas Criminal Procedure as set forth in the Arkansas Statutes (Ark. Stat. § 43-2807(b), 1947), as set out below.

> "Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency."

Statement of Facts

Petitioner Harold Rogers is an eighteen year old Negro person who, after a trial on the merits, was convicted by an all-white jury in the Sebastian County Circuit Court, Fort Smith, Arkansas District, on November 5, 1973 of the charge of rape in the first degree. The victim of the alleged rape was a twenty-one year old white woman who, according to the medical testimony, suffered absolutely no physical harm as a consequence of the acts alleged to have been committed against her. At the time of the alleged rape, the Petitioner was sixteen years old; and at the time he was convicted and sentenced he was a mere seventeen years of age.

The Petitioner was sentenced to life imprisonment, without parole, pursuant to Act 438 of the Arkansas Legis-

lature which defines the offense of rape in the first degree and stipulates that the punishment for such offense be a term of years ranging from thirty years to life imprisonment. The severity of the actual sentence, whether it be for the minimum of thirty years or a maximum of life imprisonment, is within the discretion of the jury alone.

The Arkansas Statutes also provide that, where a person is sentenced to life imprisonment, said person is not eligible for parole unless the sentence imposed is commuted to a term of years by executive clemency. See: Ark. Stat., 1947, Sections 43-2807(b).

The Petitioner appealed his conviction to the Arkansas Supreme Court alleging several errors in his trial as a basis for the reversal thereof. The Supreme Court of Arkansas affirmed the conviction on October 21, 1974 with Associate Justice Conley Byrd dissenting on the ground that the trial judge had exhibited such prejudice in the conduct of the trial that, as a matter of fact and law, the conviction should be overturned and the case remanded to the lower court for a new trial.

On November 18, 1974, the Supreme Court of Arkansas, after considering the Petitioner's Motion for a Rehearing of its October 21st decision, denied the same while refining its language in the decision by deleting a certain phrase therefrom.

Reasons for Allowance of the Writ

1. The trial court erred in not allowing sufficient voir dire examination by defense counsel on the issue of racial prejudice of the potential jurors to permit an intelligent exercise of the peremptory challenge.

The right to examine jurors on the voir dire as to the existence of racial prejudice is elementary to the conduct of a fair and impartial trial; and the Due Process Clause of the Fourteenth Amendment requires that counsel be permitted to interrogate prospective jurors about racial prejudice. See: *Aldridge* v. *United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1930); *Ham* v. *South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

In *Aldridge, supra* at pages 314-315, this Court stated:

> "[T]he question is not to the civil privileges of the Negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question, but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the Negro, we do not think that it can be said that the possibility of such prejudice is so remote [footnote omitted] as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death.
>
> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification

were barred. No surer way would be devised to bring the processes of justice into disrepute."

See also: *Ross* v. *Massachusetts*, —— U.S., —— S. Ct. ——, 38 L.Ed.2d 486, 487-488 (1973), where Justice Marshall, writing for Justice Douglas and Brennan in dissent, stated:

"The importance of the right at issue here—the opportunity to ascertain the racial bias of the venire—can hardly be gainsaid. The right to trial by an 'impartial jury' is a cornerstone of our system of justice [footnote omitted].

[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 US 199, [4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR2d 1355]. This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' Reynolds v. United States, 98 US 145, 155, [25 L.Ed. 244], Irvin v. Dowd, 366 US 717, 722, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961) (footnote omitted).

• • •

The Aldridge Court was not concerned with whether petitioner was unpopular in the community, a special target of prejudice—but rather with the potential ra-

> cial 'bias of the particular jurors who are to try the accused.' 283 US, at 314, 75 L.Ed. 1054, 73 ALR 1203. The Court did not rely on any particular circumstances to justify its requirements other than the fact that 'the possibility of prejudice [against Negroes] is [not] so remote as to justify the risk in forbidding the inquiry.' Ibid., 75 L.Ed. 1054, 73 ALR 1203. Nor did the Court purport to limit its holding to any region because the 'question is not . . . the dominant sentiment of the community. . . .' Ibid., 75 L.Ed. 1054, 73 ALR 1203.
>
> In Ham, this Court reaffirmed its commitment to the holding of Aldridge and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice—the principal target of the Fourteenth Amendment.
>
> • • •
>
> The principle that fairness demands such inquiry is, if anything, far more pervasive today than it was when Aldridge was decided, in both federal and state courts [footnote omitted]."

All of the federal circuits which have addressed themselves to the issue have held that it is error to refuse to permit defense counsel to inquire into racial prejudice of a potential juror on voir dire. See: *United States* v. *Robinson*, 466 F.2d 780 (7th Cir. 1972); *United States* v. *Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States* v. *Gore*, 435 F.2d 1110 (4th Cir. 1970); *King* v. *United States*, 362 F.2d 968 (Ct. of Appeals, D.C. 1966); *Frasier* v. *United States*, 267 F.2d 62 (1st Cir. 1959); and *United States* v. *Grant*, 494 F.2d 120 (2nd Cir. 1974) at footnote 6 on page 122.

It is abundantly clear, then, that as a matter of constitutional right an individual being tried for a crime which

he or she is accused of committing is entitled to question veniremen about their individual racial attitudes; and that the failure of a court to allow the same (or to inquire of the same at the request of the individual) is reversible error.

In the instant case, the question is more refined and boils down to the extent to which a Court must allow defense counsel to inquire into the racial attitudes of the potential juror.

The authorities seem to leave the extent of the inquiry to the sound discretion of the Court. See: *Ham, supra* at page 527. In *United States* v. *Peterson,* 483 F.2d 1222, 1226-1227 (Ct. of Appeals, D.C. 1973), *cert. denied* 414 U.S. 1007, 94 S.Ct. 367, —— L.Ed2d —— (1973), the Court of Appeals for the District of Columbia sought to clarify the degree to which a trial court should extend itself in permitting the voir dire by a defense counsel into the racial attitudes of the veniremen. It stated:

> "Examination of prospective jurors is a step vital to the fairness of jury trials. The information elicited on voir dire serves the dual purpose of aiding counsel in the exercise of challenges and the court in the determination of competence to serve [footnote omitted]. Without knowledge bearing on the qualifications of the veniremen, neither function can be performed intelligently [footnote omitted]. To the extent that the examinatorial process is deficient, the impartiality of the jury could be compromised [footnote omitted].
>
> To achieve its wholesome goals, voir dire examination must be given a wise and liberal scope [footnote omitted]. Reasonable latitude must be indulged to inquiry into attitudes and inclinations in order to assure the

> objectivity of the jurors ultimately chosen [footnote omitted]. To be sure, the trial judge retains a broad discretion as to the questions which may be addressed [footnote omitted]. But, as the Supreme Court has declared, '[t]he exercise of this discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness' [footnote omitted]."

See also: *United States* v. *Napoleone,* 349 F.2d 350, 353 (3rd Cir. 1965); *United States* v. *Daily,* 139 F.2d 7, 9 (7th Cir. 1944); *State* v. *Jordan,* 83 Ariz. 248, 320 P.2d 446, 449 (1958), *cert. denied* 357 U.S. 922, 78 S.Ct. 1364, 2 L.Ed.2d 1367 (1958); *State* v. *McKeehan,* 91 Idaho 808, 430 P.2d 866, 897 (1967); *Commonwealth* v. *McCrew,* 375 Pa. 518, 100 A.2d 467, 470 (1953).

In view of the circumstances of this case, Petitioner submits that, notwithstanding that the trial judge did give defense counsel a limited opportunity to inquire into the racial attitudes of the potential jurors, he was denied due process of law and the constitutionally guaranteed right to an impartial trial by his peers when the Judge prematurely foreclosed defense counsel from pursuing a line of questioning on the racial attitudes of the veniremen such that neither the Court nor defense counsel were able to make a reasoned and intelligent decision about the competence of the individual to serve.

In analyzing the record herein, in view of the position propounded by the Petitioner and the state of the law in this respect, this Court must acknowledge the existence of racial prejudice, an elusive fact which is seldom provable empirically but which is a real fact nonetheless and a fact which has historically stained the face of justice in the United States.

The Petitioner is Negro. The Complainant is white. The jury was totally white as a consequence of the fact that the prosecutor, with the approval of the Court, exercised a peremptory challenge to systematically remove every potential Black person from sitting on the jury.[1]

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[1] In *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), this Court made it virtually impossible to challenge the total exclusion of Black persons from a jury though the prosecution's use of its peremptory challenges, thereby undercutting and negating much of the impact of this Court's previous decisions which struck down state enforced statutes which kept persons from sitting on juries, both grand and petit, alike, in the south generally, and Arkansas, specifically. See: *Norris* v. *State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1934); *Jewell* v. *Stebbins*, 288 F.Supp. 600, 602 (E.D.Ark. 1968). See also: "Brown v. Board of Education: The Court's Relationship to Black Liberation" by Howard Moore, Jr., *Law Against the People*, at page 62, edited by Robert Lefcourt (1971), where the author proposes that:

> "The influence of the schizophrenic striving toward color-blindness can be readily seen in the laws pertaining to discrimination in the composition of juries. In 1935, in one of the Scottsboro Boys cases, the Court set forth prima facie case doctrine of jury discrimination. The rule which gave effect to the doctrine was founded upon evidence of the long and unexplained total exclusion of Blacks from jury service in Alabama. The rule, however, was no Magna Charta for Black liberation; it was little more than a rule of evidence. In operation, a situation was created in which a Black litigant could secure reversal of a conviction or a new trial by submitting evidence of the long, unexplained exclusion of Blacks from lists for jury service. Since 1935, the rule has been progressively expanded to require the reversal of conviction where evidence was presented that even though Blacks had been included on a master jury list there remained a substantial disparity between the number of Blacks in the jurisdiction eligible for jury service and those actually included. The application of this rule, however, does not require Blacks actually to serve on the juries. Indeed, the right of Blacks actually to serve on and be tried by juries of their peers was totally frustrated by Swain v. Alabama (1965), in which the Supreme Court implicitly sanctioned the use of peremptory strikes to eliminate Black jurors. A state may still, today, legally lynch Blacks by trying them before an all-white jury if the state can show there is not too great a disparity be-

Most importantly, the Court must recognize that in the southern regions of the United States, generally, and Arkansas, specifically, where this case arose, a fundamental sexual taboo of the society was at issue, the sexual relationship of a Black man and a white woman.

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tween the number of Blacks included on a master jury list and those eligible. The short of the matter is that all a state needs to do is to show that it is color-blind with respect to summoning persons for jury service. If Blacks do not actually serve, it does not legally matter. Form is exalted over substance. The twin myths of equality and nondiscrimination are perpetuated. Antagonism between promise and performance is intensified."

See also: "Racism and American Law", by Haywood Burns, *Law Against the People*, *supra* at pages 49-50, where the author states:

"There is much about the law today that may not be racist on its face but is racist in its impact. This racism is the result of the context in which our legal system must function—a society infected by racism—and the legacy of overt societal and explicit legal racism. Failure to take this legacy into account will often cause apparently 'neutral' or 'objective' systems to have an untoward racial dimension. Their impact may be intended or coincidental. However, the very failure to take this legacy into account must itself be regarded as racist, for to act as if the overt racism of the past never occurred, and to design systems of law without taking it into account, is to perpetuate the historical effect of racism.

* * *

Statutes no longer bar nonwhites from juries, and the courts have made it clear that systematic exclusion of nonwhite persons from juries is constitutionally unacceptable. Yet through prosecutors' use of the peremptory challenge of prospective jurors, legions of Black men and women have their fates decided by all-white juries from which members of their own race have been systematically excluded. The peremptory challenge allows the prosecutor in selecting the jury to remove a given number of members from the panel without giving a reason. Throughout the country this device is used by prosecutors to remove Black prospective jurors from jury panels in cases involving Black defendants."

In the instant case, six Black individuals were presented to counsel for their examination; and after each of these individuals was questioned, the state exercised a peremptory challenge and excused the prospective juror. Juror Perkins was excused by the

Until very recently, the nightmare of the southern conscience was codified in miscegenation laws and prohibitions against fornication, which effectively banned sexual relations between persons of different races. The Arkansas miscegenation law, Ark. Stat. Ann. 55-104, was repealed only as recently as 1973. It would be ludicrous to assert

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State at page 356 of the record. Juror Evans was excused by the State at page 395 of the record. Juror Ware was excused by the State at page 468 of the record. Juror Black was excused by the State at page 513 of the record. Juror Whitefield was excused by the State at page 560 of the record; and Juror West was excused by the State at page 558 of the record. After each exercise by the State of the peremptory challenge, in this regard, defense counsel challenged the same on constitutional grounds.

The only assertion that the prosecutor made in response to the repeated challenges of the defense counsel to his exercise of his peremptory challenges to remove Black persons from the jury was the bland assertion that his exercise was not discriminatory and that it was defense counsel who was interjecting race into the trial (R. 469-70; 517-19).

Moreover, aside from the state's abusive exercise of its peremptory challenges in excusing every Black person from the jury panel, the trial court failed to include two Black persons who came into the jury panel after the initial draw of twenty-four from which counsel began to question prospective jurors individually. In substance, the two Black jurors could not have been within the initial twenty-four because their names were not put into the box until after that twenty-four names were drawn. Defense counsel challenged this procedure (R. 230-1).

Interestingly and significantly, as well, is the fact that almost one third of the Black persons who were advised to report for jury duty in this matter did not initially appear; and were excused by the judge for reasons which he could not recall or be particularly specific about (R. 152-4). Defense counsel objected to the same without a positive result; and, as a consequence, the situation arose where the two Black jurors previously mentioned did appear after the initial draw of twenty-four. It is submitted the procedure employed in this respect as well as the fact that the trial judge exercised his discretion to dismiss a number of Black persons from jury duty, without an appropriate reason therefore, prejudiced the Petitioner in his effort to obtain a fair and cross-sectioned jury panel; and, accordingly, required, among other things, that defense counsel be permitted to examine, in depth, the racial attitudes of the prospective panel of white jurors.

that the underlying aversion to interracial sex, to which this statute gave expression, disappeared at the same time.

Accordingly and in view of the exerpts from the record set forth hereinafter, the trial judge committed reversible error in foreclosing defense counsel from exploring the subtleties of racial attitudes of the potential jurors, particularly those attitudes relating to the social inter-action of white persons and Black persons of the opposite sex.

The evidence shows that the trial judge herein clearly thwarted the purpose of the voir dire. On a number of occasions the trial court interrupted defense counsel and refused to permit any further questions of the veniremen regarding their attitudes. This was clearly erroneous because it deprived the Petitioner of his right to make an informed decision whether to challenge the veniremen peremptorily or for cause.

Examples of this error may be seen in the transcript of the examination of the prospective juror Mr. Sieben Morgan:

> Q. I'll ask you, personally, do you have any racial prejudices? A. No.
>
> Q. You understand the white race [sic] can be either objective or subjective? You know what I mean when I talk about subjective and objective races [racism]? A. No.
>
> Q. O.K., let me explain that, so I can ask you some questions. One form of racism is objective, and something you can put your finger on. Like if I went into a bar and the owner said to me—I'm black—'I don't want any black people in my bar,' or maybe use a little stronger language. It gives you some idea objectively that he doesn't want any black people around, he doesn't like black people. That's objective reasons, racism.

The other kind is subjective, which is a lot more difficult to deal with. I deal with it in all different things. It's a feeling within you that a person of a darker color or a black person is inferior and that they don't take advantage of educational opportunities. Subjective racism may mean an inward feeling that if the Irish and Italians, and the Germans, Scandinavians can make a go of it, become a credit to America, why can't the black people do the same thing when they've been here over three hundred years. Someone might not stress this feeling or say it out loud, express it, but he would have the feeling inside. Might have it and say to yourself, 'I'd hate to have my daughter or my son marry a Negro.'

The Court: Gentlemen, come up here. (The following at barside, out of hearing of the jurors.)

The Court: Now, the reporter has this speech down. And it's pure effort, it seems, on the part of the Defense to arouse passion, to arouse racism, to appeal to disturbing influences, which I will say this town has been blessed to have been without. But apart from that, isn't the question, sir, whether or not they believe a black person or a colored person, or an Irishman will tell the truth as readily as a white person? Now, I think this is what you're interested in (R.257-8).

The Court: Now, your question—when you ask about objective and subjective, I wonder about it myself, sir, and think where does this lead to. I can't accept this approach to voir dire. I think what you all have been doing, the questions you have been asking so far have been proper, and they have been at great length and the Court has not interrupted you. I've permitted you to go right ahead. But I do

say I will decline to let you proceed further along the lines that you just did, going into the subjective and objective and how you feel about your daughter marrying a black man and this sort of thing. That is not a part of this, I don't think that is a necessary question. I think the basic thing is to determine whether or not you've got a juror who has a fair and open mind, who is not going to be bigoted one way or the other, and because he's a black man you're not going to believe him (R.261-2).

Mr. Meyerson: We'll pursue some questions about whether or not they're prejudiced as to race.

The Court: Yes, but perhaps—Mrs. Miller, gentlemen, what struck me as offensive was the illustrations you used. I'll say that in an attempt to reason with you about it.

Mr. Meyerson: If I could, I would like to note an exception to the ruling. If you're going to prevent me from pursuing this particular line of questioning. I would like to note an exception.

The Court: My ruling is that you should not pursue this type of questioning in the manner which you did. I can't of course, particularize word for word, but you do understand my basic point. Will you believe a white man before you will a black man, and are you prejudiced, anything that demonstrates prejudice, but I don't think to the extent, please, sir, to marriage between and things like that (R.262-3).

Q. Did you have any problem with interracial social gatherings? A. No.

Q. Would you have any problem with your daughter dating a black man?

The Court: I don't think that has anything to do with this lawsuit. Does it?

Mr. Meyerson: I believe it does, Your Honor.

The Court: If you're telling me in good faith that it does, he may answer the question.

Mr. Meyerson: Reflecting back on our discussion at the bench.

The Court: I don't recall anything about that, but I'll take your word for it, that it's relevant in this case.

A. Would you repeat the question?

Q. Would you have problems with your daughter going out with a black gentleman? A. Yes.

Q. Will you be able to deal with this case notwithstanding the fact that you've indicated you would have some problem with your daughter going out with a black man? A. No, it would have no bearing on this case.

Q. Even though this case may involve an encounter between a white woman and a black man, you'll be able to keep personal feelings aside? A. Right.

Q. Is the basis of your reason that you wouldn't want your daughter—that you have a problem with your daughter going out with black men, racial prejudice? A. Well, not exactly racial prejudice.

The Court: Now, I think we've going into that far enough. You've asked him enough. As I explained at barside here, I think I've allowed counsel great latitude, and if you want to get down to the bare facts with me and come up here and tell me one or two things, I'm willing to let you go into that. But unless you make some declarations of record to me, I'm not going to permit this particular type of questioning.

Mr. Meyerson: Your Honor, If it is racial prejudice—and the gentleman has indicated he doesn't think it is—if it is, he must be dismissed for cause.

The Court: Sir, he has said that he would object to his daughter going out with a black man.

Mr. Meyerson: And I asked if the basis of that was racial prejudice.

The Court: Sir, he has said that he would object to his daughter going out with a black man.

Mr. Meyerson: And I asked if the basis of that was racial prejudice.

The Court: That was the question?

Mr. Meyerson: Right.

The Court: Then you said in the case at bar here would an encounter between a white woman and a black man—would this tend to bias or prejudice. This, in effect, is what you asked, isn't it? And he said no, that would have nothing to do with his daughter going out with a black man.

Mr. Meyerson: If it deals with racial prejudice, and we have a black defendant, then I think it's blatant that he would have to be removed for cause, Your Honor.

The Court: If you want to spend the rest of your time talking about this sort of thing, I think we better have a little conference up here at barside (R.272-4).

Another example of the trial court's error in refusing to permit sufficient vior dire examination may be seen in the examination of Mr. Bartley:

Q. Do you have any racial prejudice? A. No, no, I don't.

Q. Do you think there's any difference between a black person and a white person? A. Color.

Q. Outside of color? A. No.

Q. Do you think that black people are lazier than white people? A. No.

Q. You think they're better athletes than white people? A. Yeah, I think—

The Court: You don't have to answer that question. Let's move along, please.

A. I feel they are, no doubt about it.

Q. I'd like to pursue that.

The Court: I have declined to let you pursue it further, sir. You are abusing your opportunities on voir dire here, in the opinion of this Court. I've put up with it for two days, I expect to put up with it a lot more. But I do ask your cooperation, and terminate this phase of it, please. Over your objection, of course, and exceptions (R.437-8).

Here, again, it is clear that the trial judge abused his discretion, making it impossible for counsel to make an informed decision whether to challenge this juror.

From this excerpt of the transcript of the voir dire examination one can reasonably and readily see that the juror's original statement that he has no prejudice was modified somewhat by his stand on interracial dating. When defense counsel sought to probe into the basis for his racial attitude, the trial judge cut him off. This is an obvious error because it prevented defense counsel from determining if the venireman was racially prejudiced and subject to a challenge for cause; or whether defense counsel wanted to use one of its peremptory challenges. This action by the trial judge interfered with one of the fundamental purposes of the voir dire and for that reason constitutes reversible error. In fact, the judge, himself, indicated that he was aware of the shady grounds on which his ruling was based. On page 260 of the record he states: ". . . I may be reversed by our Supreme Court or the United States Court. . ." and then declines to permit

defense counsel to continue his examination in regard to objective and subjective racism.

In view of the foregoing, Petitioner submits that this Court should reverse his conviction and remand the matter back to the trial court for a new trial unencumbered by the prejudicial error made by that court during defense counsel's voir dire of the prospective jurors.

2. A showing of bias and unwarranted reprimands by the trial judge deprived the Petitioner of an impartial trial in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In dissent, Associate Justice Conley Byrd of the Arkansas Supreme Court stated herein:

> "I would reverse and remand this case for a new trial because of the trial court's remarks to appellant's [Petitioner's] counsel during the cross-examination of the prosecutrix.
>
> • • •
>
> Here I cannot say that the record manifestly shows that the trial court's expressed irritation did not prejudice either appellant's [Petitioner's] conviction or the extent of his punishment. It certainly did not help appellant [Petitioner]. Consequently, I would reverse for a new trial. . . ."

In *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has endeavored to prevent even the probability of unfairness. . . . Circumstances and relationships must be considered."

This Court has said, moreover, that:

> "Every procedure which would offer a possible temptation to the average man as a judge [the juror] . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

Tumey v. *State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

In *Connelly* v. *United States*, 191 F.2d 682, 697 (9th Cir. 1951), the Ninth Circuit Court of Appeals stated:

> "It is not enough that the judge, despite his predetermination of the essential facts, may put them aside and conduct a fair trial, but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality."

See also: *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954).

The atmosphere about the proceeding, herein, gave no assurance of fairness and impartiality to the public, yet alone the Petitioner.

In discussing the fundamental rights of a defendant to a fair trial before a fair tribunal, the Court stated in *Knapp* v. *Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956):

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942; Talbert v. Muskegon Construction Co., 305 Mich. 345, 348, 9 N.W. 2d 572. If this basic principle is

violated, the judgment must be reversed. In re Murchison, supra; Berger v. United States, 255 U.S. 22, 41 S.Ct. 230; 65 L.Ed. 481; Moskun v. United States, 6 Cir., 143 F.2d 129, 130; N.L.R.B. v. Phelps, 5 Cir., 136 F.2d 562.

Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code.

* * *

This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial. However, there would seem to be close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias or prejudice appearing during the course of the proceedings which would render the judgment therein invalid."

See also: *Offutt* v. *United States, supra;* and *Cooke* v. *United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).[2]

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[2] It has been the practice of the Arkansas Supreme Court to maintain the highest standards of impartiality and justice, as well. In fact, in a recent case where a rebuke to counsel was held to be prejudicial error, that Court stated:

"[W]e consider that justice ought not only to be fair, but Appear to Be Fair . . . to the same effect see Jones v. State, 166 Ark. 290, 265 S.W. 974 (1924)." (Italics in original)

Wilbur Davis v. *State*, 242 Ark. 43, 411 S.W. 2d 531 (1967).

The Court in *Robinson* v. *State of Florida*, 161 So.2d 578, 579 (1964) held that this preference need not be explicit nor even indicated by the judges comment; reversal is required when the

It is in recognition of this strict requirement of fairness that the Petitioner herein seeks a new trial in order to overcome the prejudicial errors caused by the trial Court's unwarranted reprimand to the defense counsel at a crucial

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jury merely could have interpreted the comment as a preference towards the witness' version.

As noted in ***Robinson, supra:***

> "The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments . . . overshadow those of the litigants, witnesses and other Court Officers. Where such comment expresses or tends to express the judges view as to the weight of the evidence, the credibility of a witness, or the guilt of the accused, it thereby destroys the impartiality of a trial to which the . . . accused is entitled. Hamilton v. State, Fla. App. 1959 109 So. 2d 422, 424-425."

Further, *Robinson* holds that: "Where there is simply a doubt, as here, that an accused has been prejudiced by a remark of the Court, we must grant him a new trial." *Ibid.* at page 579. See also: *Arkansas Highway Comm.* v. *Jensen*, 253 Ark. 795, 489 S.W. 2d 5, 7 (1973), where the Court stated:

> "There is a presumption that every error is prejudicial, unless it is demonstrated otherwise or manifestly is not. When the Supreme Court cannot say with confidence that the error is not prejudicial, it will reverse."

The potential harm of a Court's remark to counsel within the hearing of a jury is also pointed out in *Hansen* v. *St. Paul City Ry. Co.*, 231 Minn. 354, 43 N.W. 2d 260, 264 (1950):

> "It is improper for him [the trial judge] to unduly criticize counsel in the presence of the jury or make remarks in the course of the trial showing bias in favor of one of the parties or which will tend to incite hostility or prejudice in the minds of the jury toward one party and sympathy for another."

See also: *State of Minn.* v. *Jordan*, 272 Minn. 84, 136 N.W. 2d 601, 602 (1956), wherein the Court noted: "Verbal exchanges between court and counsel may deprive the defendant in a criminal case of a fair trial."

The trial court herein committed error by not adhering to the guidelines set forth in *Miller* v. *State*, 239 Ark. 836, 843, 394 S.W. 2d 601 (1965) where the Court said:

> "We believe it would be a good practice for all courts to refrain from making any statements, other than a judicial ruling, that might have a tendency to influence a jury in arriving at a verdict in a pending case."

point in the trial and by the judge's failure to maintain an impartial hearing, generally, throughout the proceedings.

Where the accused is charged with a highly emotional offense, as is the case herein, the need for propriety on the part of the trial judge is particularly great. Judicial restraint is especially necessary where the testimony and cross-examination of the prosecuting witness is, as in the instant case, the most direct, and thus most decisive, evidence the jury will hear. Yet, at this crucial juncture, when the credibility and stability of the allegations were set forth for the jury's judgment, the court berated the defense counsel as shown in the record:

> Q. While you were sitting in his lap where were your hands? A. Around his neck.
>
> Mrs. Miller: Your Honor, maybe the prosecutrix would like a few minutes.
>
> The Court: I beg your pardon?
>
> Mrs. Miller: Maybe the prosecutrix would like a few minutes to get herself together.
>
> The Court: Well, you got her this way. Why don't you go ahead. (Emphasis added).
>
> Mr. Meyerson: Your Honor, the defense would like to point out that we're not intentionally attempting to get her this way, and we would like for her to have an opportunity to get herself together.
>
> The Court: I didn't know she appeared to be so distraught. Do you wish to recess?
>
> A. No.
>
> The Court: I beg your pardon?
>
> A. I can finish.
>
> Mr. Howard: Your Honor, may we approach the bench. (the following at barside out of hearing of the jury.)

Mr. Howard: The defendant at this time moves for a mistrial, the Court having made the statement, in the presence of the jury, that defense counsel having got this witness that way. We think that is highly prejudicial, and any instruction would not remove that from the minds of the jury. We at this time move for a mistrial.

The Court: It will be denied.

Mr. Howard: Note the exception.

Mr. Meyerson: May we have a recess, Your Honor?

The Court: I would like to finish with the witness, then we'll have a recess.

(Barside discussion concluded). (R. 663-4).

By holding the defense counsel up for disapprobation, even ridicule, the trial judge exhibited and demonstrated a clear bias and sympathy for the prosecuting witness from which the jury could infer a preference for the view of the prosecutrix and the state.

Further, reprimands and examples of bias shown by the trial judge, while not necessarily within the hearing of the jury, warrant the attention of this Court as an indication of the attitude and demeanor of the trial judge throughout the trial, an attitude which clearly favored the prosecution and sought to portray the defense as inflammatory, incompetent and deceitful outsiders:

Mr. Meyerson: Could I explain the reason that I was asking those questions?

The Court: You've told me, he has told me. You have told me that you do not know yet whether it will be or not. I find that, sir—and I say this without

meaning to offend you—difficult to believe. . . . (R. 277-8).

Mr. Meyerson: We can certainly ask questions to ascertain whether or not he's racially prejudiced, in our opinion, for our client.

The Court: Well, I'm not going to permit you to go on and on and on, and I'm telling you if you came here to get my goat and to get me to get an error in here, which it's beginning to look a little bit like, then I can ride this just as long as you can. I haven't got anything—I'll cancel all my affairs for the next two weeks, and I can take my own sweet time about this (R. 279-80).

Mr. Meyerson: If it's not racial prejudice, what is the reason he doesn't want his daughter—[to date a black man]

The Court: Doesn't it speak for itself?

Mr. Meyerson: No. If it's not racial prejudice, I'd like to know what it is. It's not very obvious to me.

Furthermore, there is clear evidence in the record that the trial judge's basic premise underlying his rulings was that the accused was guilty of the crime for which he was charged and presumed innocent thereof. The judge's comments during the hearing on the motion to reduce bail reflect the same. Interestingly he set bail at the exorbitant sum of $100,000.00 despite the fact that the accused returned voluntarily from outside the state to stand trial.

The trial judge clearly indicated that he believed the Petitioner returned only because he felt that the prosecution could not make out a solid case against him; and in doing so, the Court dispensed with the presumption of innocence that the American system guarantees to each defendant (R. 72).

The Court referred to the precautions against conviction which he believed the Petitioner took, again, substituting his conclusion for the jury's verdict (R. 73).

Because of a previous case involving the Petitioner and a similar charge, in which the evidence was insufficient to convict the Petitioner and at which the trial judge herein presided, the trial judge based his conclusion that the Petitioner was guilty of the alleged crime in the instant case (R. 73).

Furthermore, in spite of a recognition that it is improper to base the amount of the accused's bond on public hysteria and his recognition that in doing so he might be committing reversible error (R. 74), the judge resorted to rule by public opinion over the rule of law and characterized the Petitioner, *before trial,* as a "dangerous man" (R. 75).

In that regard, the trial judge's statements at the bail hearing are most revealing and dispositive of his prejudicial attitude and feeling in this matter:

> "I have tried, from the beginning, to put myself in this defendant's position, Mr. Rogers' position. And I do this—this is a routine consideration. I think about a man, what is his particular situation, this individual's situation. I can see where Mr. Rogers might well have felt 'they don't really have anything on me.' I can also see there's been no reason given for his sudden departure which occurred in the month of November. And he was charged with one of these offenses on the 1st of November, and another on the 31st of October. He left right after that apparently. Why? I think he thought it was smart. The Court well could take it that he thought it was smart to get out of town. He may have had reflections that 'they really don't have any-

thing on me.' And, having heard the trial of that other case, I could see where he might have thought, 'Well, they can't prove it,' because of the precautions he took such as the wearing of a mask, et cetera, et cetera. He apparently was aware of the reputation of this lawyer that he went to. Anyway, he came back here. Now, at the posture of events everything was going all right for Mr. Rogers. However, I think Mr. Rogers had his eyes opened when this case was tried. Now, I can't help but tell you gentlemen, Mr. Howard and Ms. Miller, that from the criticism I've heard from members of that jury—that was an eleven to one verdict for conviction. From the very beginning there was one man that held out all that time. Mr. Rogers learned then that there was strong evidence against him. And if I hadn't heard that trial, I would be much more sympathetic toward reducing this bail. If I were Mr. Rogers and I came back here voluntarily, and if I could have gotten out on bond even a $50,000.00 bond, before I was tried, I probably would not have run. Once I was tried, and I were allowed to stay on that same bond, I could well have been motivated to run, because I could realize what they had against me and that I was apt to go to the penitentiary for life. And I want to add something else. Now, you don't have it in your memorandum—and I recognize, Mr. Howard, Ms. Miller, that this is not a—I think the case is—you certainly read about it in the paper—the public is entitled to some protection against criminals. I can't help but want to tell you all that these events occurring at these shopping centers here—and there were at least—there was another one besides this one reported—caused great alarm and consternation in this community. It's one of the few times I've ever had my

phone ringing—'What's happening at these shopping centers? And what are you going to do about it?' The women were afraid to go to the shopping centers around here. After that trial I had calls—'Are you going to let that man out?' The people are alarmed. And I think while the appellate courts might say, 'Judge, you're wrong in taking that type thing into consideration,' I don't believe they would say the Court is totally wrong. If you've got a dangerous man in there, the Court has some responsibility about keeping him off the streets. And I've heard this trial, as I said, and I think whoever did it is certainly a dangerous man. There is the—to go back to the old saying, the proof is evident, the presumption great—that might well be applicable in this case. There's a reporter sitting in here—I'm going to ask you not to quote me, please, in connection with this matter. But I'm trying to express why I feel this alarm."

(R. 72-75).

Thus one can readily conclude from the record that the judge's bias and prejudice against the Petitioner permeated the proceedings and denied the Petitioner a fair trial.[3] Accordingly, this Court must reverse and remand for a new trial.

3. A sentence of life imprisonment wthout an opportunity for parole, imposed upon a first-offender minor,

[3] Interestingly and significantly, after the bail proceeding at which the judge manifested an incredibly prejudicial attitude (as set forth above and as was reinforced and displayed during the trial), defense counsel, on behalf of the Petitioner, submitted a motion to the trial judge for him to disqualify himself (R. 119-20). The trial judge refused to do so. See: Letter from trial judge as incorporated in the appendix (said letter was not included in the record).

whose offense resulted in no physical harm to the victim, is so excessive and disproportionate to the illegal act as to constitute cruel and unusual punishment.

A. An excessive prison sentence may constitute cruel and unusual punishment if it is grossly disproportionate to the offense.

Petitioner Harold Eugene Rogers, age 16 at the time of the alleged offense, was found guilty of rape in the first degree and sentenced to life imprisonment pursuant to Act 438 of the Arkansas Legislature. This act defines the offense of rape in the first degree and stipulates that punishment for such offense be a term of years ranging from 30 years to life imprisonment. The severity of the actual sentence, whether it be for the minimum of 30 years or a maximum of life imprisonment, is within the discretion of the jury alone.

Additionally, the Arkansas Code of Criminal Procedure stipulates that "individuals sentenced to life imprisonment after the effective date [February 12, 1969] of this act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency." Ark. Crim. Proc. §§43-2807(b) (Ark. Stat., 1947). Thus, the Appellant, in receiving a life sentence, received in actual fact an absolute sentence of life imprisonment without an opportunity of parole.

A wide scope must be given to legislative and judicial discretion in the area of sentencing. Responsible authorities, including appellate courts, are becoming more and more aware, however, of the seriousness of sentencing inequities, and particularly concerned about the disparities in sentencing.

> *One of the most serious aspects of the disparity problem is the imposition of sentences which are*

grossly excessive in relation to the seriousness of the crime or the character of the offender."

U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, at pages 24-25 (1967).

Proposals for reform of the sentencing system abound in recent years. See: e.g., ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures (Approved Draft 1968); Advisory Council of Judges, National Council on Crime and Delinquency, Model Sentencing Act, 9 Crime and Delinquency 339 (1963); ALI Model Penal Code, Penal Code, §7.01 (Proposed Official Draft 1962).

Constitutional restrictions are imposed on the exercise of sentencing discretion only at the extremes. Restrictions on the procedures for determining sentences are based on general due process and on the right to counsel; restrictions on the substantive character of sentences are based on general due process and the prohibtion of cruel and unusual punishment. A defendant is entitled to be represented by counsel at sentencing. *Mempa* v. *Rhay*, 389 U.S. 128, 88 S.Ct. 254, 18 L.Ed.2d 336 (1967); *Townsend* v. *Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1960 (1948). He is also entitled to be protected against having his sentence based on false information regarding his prior record. *Townsend* v. *Burke*, *supra*. This protection includes the right to have information, on which the sentencing judge relies, disclosed to him; and, the right to an opportunity to refute or explain that information. *Williams* v. *New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *Baker* v. *United States*, 338 F.2d 931 (4th Cir. 1968). The sentencing decision may not be based on in-

formation obtained in violation of the defendant's constitutional rights. *United States* v. *Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972). These rights protect only the extremes of due process considerations. At sentencing, a defendant does not have a right to full notice and hearing; and the sentencing judge need not give reasons or his decision. *Williams* v. *New York, supra;* compare *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); cf. *Colten* v. *Kentucky*, 407 U.S. 104, 92 S.Ct. 1953 (1972).

The Eighth Amendment to the United States Constitution provides in part: "[N]or [shall] cruel and unusual punishments [be] inflicted." This provision applies against the states through the Due Process Clause of the Fourteenth Amendment. *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972); *Robinson* v. *California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Ordinarily, it stands guard over the method by which punishment is inflicted. *Furman* v. *Georgia*, 92 S.Ct. at 2766-71 (Marshall, J., concurring). In this case, however, it is not alleged that imprisonment, or even life imprisonment, is an unconstitutional method of punishment for crime.

Instead, Petitioner's argument is that the life imprisonment sentence imposed, in light of all the attendant circumstances, is so grossly excessive as to be constitutionally disproportionate to his illegal act.

The landmark decision of this Court recognizing the disproportionality principle under the Eight Amendment is *Weems* v. *United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). In *Weems*, the defendant was a Coast Guard officer convicted in a Phillippine court of falsifying wage statements. For that offense, he was sentenced to 15 years at hard labor and in chains, forfeiture of civil rights,

and surveillance during life. This Court held that that sentence amounted to unconstitutionally cruel and unusual punishment, reasoning that the punishment was "cruel in its excess of imprisonment and that which accompanies and follow imprisonment." *Id.* at page 377. The Court also held that "such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice [and of the fundamental law] that punishment for crime should be graduated and proportioned to offense." *Ibid.* In reaching its result, this Court relied in part on the dissenting opinion of Justice Field, joined by Justices Harland and Brewer, in *O'Neil* v. *Vermont*, 144 U.S. 323, 339-340 (1892). As the *Weems* Court quoted Justice Field's opinion, he wrote that the cruel and unusual punishment clause was directed " 'against all punishment which by their excessive length or severity are greatly disproportioned to the offenses charged. . . .' He said further: 'The whole inhibition is against that which is excessive in the bail required or fine imposed, or punishment inflicted.' " *Weems, supra* at page 371. See generally: Packer, Making the Punishment Fit the Crime, 77 Harv. L.Rev. 1071 (1964); Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L.Rev. 838 (1972).

In this Court's recent decision striking down the death penalties in Georgia and Texas under the Eighth Amendment, *Furman* v. *Georgia, supra,* at least six justices expressed adherence to this principle. Justice Brennan elaborated the concept of disproportionality as follows:

> "The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unneces-

sary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive." *Id.* at page 2747.

In the same case, Justice Marshall wrote as follows:

"[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. Weems v. United States, supra. The decision previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishment clause is to prevent excessive or unnecessary penalties, e.g., Wilkerson v. Utah, 99 U.S., at 134; O'Neil v. Vermont, 144 U.S. at (339-340) (Field, J., dissenting); Weems v. United States, 217 U.S. at 381; Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); these punishments are unconstitutional even though popular sentiment may favor them." *Id.* at page 2773.

He also wrote:

"Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those which were inherently cruel." *Id.* at page 2270.

All of the dissenting justices accepted at least this much. Mr. Justice Powell, speaking for himself, Chief Justice Burger, and Justices Blackmun and Rehnquist, said:

> "Nor are we asked, at least as part of the core submission in these cases, to determine whether the penalty might be a grossly excessive punishment for some specific criminal conduct. Either inquiry would call for a discriminating evaluation of particular means, or of the relationship between particular conduct and its punishment." *Id.* at page 2824.

In his opinion for four dissenters, Chief Justice Burger also seemed to accept the concept that the Eighth Amendment prohibits punishment that is "grossly out of proportion to the severity of the crime." *Id.* at page 2806. In a footnote, he said that: "The Court's decision in *Robinson* v. *California,* 370 U.S. 660 (1962), can be viewed as an extension of the disproportionality doctrine of the Eighth Amendment." *Id.* at page 2806, n. 18. He also acknowledged that *Weems* is generally regarded as a disproportionality case, although "it is readily apparent that the decision grew out of the Court's overwhelming abhorrence of the imposition of the particular penalty for the particular crime." *Id.* at page 2806.

The Fourth Circuit expressly recognized disproportionality as an aspect of cruel and unusual punishment in *Ralph* v. *Warden,* 438 F.2d 786, 789-90 (4th Cir. 1970). In that case, the court held that the death penalty "is so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment." *Id.* at page 793. The Court did not hold the death penalty unconstitutional; nor did it hold the death penalty unconstitutional in all rape cases. *Id.* Instead, it merely held that a punishment that might be permissible in some cases was unconstitutionally excessive in other cases. That is precisely the case herein except

that the Petitioner is concerned with a prison sentence for life—without parole—rather than a death sentence.

Several state jurisdictions have held lengthy prison sentences excessively disproportionate for the crime committed.

In *In re Lynch*, 105 Cal. Rptr. 217 (1972), the California Supreme Court held that a sentence of imprisonment for "one-to-life" for a second offense of indecent exposure violated the cruel and unusual punishment clause of the California constitution. The court held that the "total disparity" between the potentially lengthy prison sentence and the non-violent offense committed by the defendant rendered the punishment constitutionally disproportionate. In reaching that result, the California court relied primarily on this Court's decisions in *Weems* v. *United States* and *Furman* v. *Georgia*, the Fourth Circuit's decision in *Ralph* v. *Warden*, and state court decisions such as *People* v. *Lorentzen*, discussed below. Recently, the Michigan Supreme Court, in a unanimous decision on this issue, held that a mandatory minimum prison sentence of 20 years for the unlicensed distribution of marijuana violated the state and federal prohibitions against cruel and unusual punishment. *People* v. *Lorentzen*, 387 Mich. 167, 194 N.W. 2d 827 (1972). The court compared the sentence to those provided in Michigan for other crimes involving the sale of harmful substances to others, and to those provided in Michigan for crimes involving bodily harm, and concluded that the 20-year minimum sentence "clearly fails to meet the test of proportionality." *People* v. *Lorentzen*, 387 Mich. at page 178, 194 N.W. 2d at page 832. The court then held: "A compulsory prison sentence of 20 years for a non-violent crime imposed without consideration for defendant's individual personality and history is so excessive that it

'shocks the conscience'." *Id.* at page 181, 194 N.W. 2d at page 834.

Later, in *People* v. *Sinclair*, 387 Mich. 91, 194 N.W. 2d 878, 895, 900-906 (1972) (T.C. Kavanagh, Brennan and Addams, JJ., concurring), three justices of the Michigan Supreme Court held that a prison term of 9½-10 years for possession of marijuana violated the Eighth Amendment because it was grossly excessive. The other justices reversed the conviction on other grounds.

A recurring situation in Indiana has been the conviction of a defendant of a lesser included offense that carried a greater penalty than the principal offense. The Indiana Supreme Court has held this circumstance violative of the Eighth Amendment. *Hobbs* v. *State*, 252 N.E. 2d 498, 500-501 (1969); *Dembowski* v. *State*, 240 N.E. 2d 815, 817-18 (1968); See also: *In re Cannon*, 203 Or. 629, 281 P.2d 233 (1955).

In Alaska, one member of the three-justice Supreme Court held an aggregate 36-year sentence for conviction of eight counts of drawing checks with insufficient funds worth $1,384.35 during one spree is "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice" and a violation of the Eighth Amendment. *Faulkner* v. *State*, 445 P.2d 815, (1968). Finally, in a federal case, the Sixth Circuit held that a five-year prison sentence for induction refusal, in a case where the defendant was at all times willing to serve in a noncombatant capacity, "was excessive and out of proportion to the offense. *Weems* v. *United States*. . . ." *United States* v. *McKinney*, 427 F.2d 449, 455 (6th Cir. 1970).

Most decisions dealing with alleged unconstitutional excessiveness of a prison sentence, however, hold that, if the sentence is within the limits established by the legislature,

it is valid. See: *Ralph* v. *Warden,* 438 F.2d 786, 788, n. 1 (4th Cir., 1970). This rule was recently affirmed as the prevailing view in the State of Arkansas. *McDonald* v. *State,* 253 Ark. 812, 491 S.W. 2d 36 (1973). In that case, a white defendant, convicted of rape while wielding a knife, received the minimum sentence of thirty years. This Court, in refusing to mitigate the sentence, stated that, "inasmuch as the determination of the limits of punishment lies peculiarly within the legislative province, we have no basis for disturbing the verdict." *Id.* at page 815.

While the holding of *McDonald* v. *State, supra,* is no doubt the majority view held by the Arkansas Supreme Court,[4] Petitioner pleads this court to give cognizance and authority to the more current, fair and humane approach to excessive, disproportionate punishments. That approach is epitomized by recent decisions of this Court and the highest courts of a number of states. (See: *Discussion, supra*). Its thrust is that "the Eighth Amendment is a limitation on both legislative and judicial action." *Ralph* v. *Warden, supra* at pages 788-89.

Petitioner submits that this Court must scrutinize closely the record sub judice; and, in doing so, it must conclude that, considering all the attendant circumstances, the sentence of the Petitioner in its severity and excessiveness was disproportionate to the offense committed.

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[4] While not explicit, there is in the vast body of Arkanses decisional law a concept, albeit somewhat truncated, related to the disproportionality doctrine. See: *Carson* v. *State,* 206 Ark. 80, 173 S.W. 2d 172 (1943).

B. The excessive sentence in this case—life imprisonment without an opportunity for parole—where the defendant is a juvenile and the victim suffered no physical injury—is grossly disproportionate to the offense and therefore constitutes cruel and unusual punishment.

No one can deny that rape is one of the most morally reprehensible criminal offenses. Historically, the act has been the subject of the most severe penalties and public condemnation. Until very recently, the state of Arkansas was among several states that punished rape with death. Ark. Stat. §41-3403 (repealed 1973, by ACT 438).

Yet it is significant that, of the eight state jurisdictions which imposed the death penalty for rape, before *Furman* v. *Georgia, supra,* invalidated the majority of capital punishment Statutes, seven have since enacted new capital punishment legislation but have, at the same time, affirmatively abandoned death as punishment for rape.[5] The Arkansas Legislature, in abrogating capital punishment as a penalty for rape, reflected the current and more enlightened attitude towards the gravity of such an offense.[6]

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[5] See: 1973 Ark. Stat., Act 438; Fla. Stat. §921.141 (1972); 1973 La. Stat., Acts 109, 111, 125, 106, 107; 1973 Nev. Laws, Chap. 798; Okla. Enrolled House Bill No. 1101 (1973); Tenn. Pub. Law, Chap. 192 (1973); Tex. Stat., 1973, Chap. 426. The remaining eight States, which provided a discretionary death penalty for rape before *Furman* v. *Georgia* (Alabama, Kentucky, Maryland, Mississippi, Missouri, North Carolina, South Carolina, and Virginia) have not enacted any new death penalty legislation. On March 13, 1974, the United States Senate passed S. 1401, which provides a death penalty for rape. The new Senate bill abandons capital punishment for this crime.

[6] See: *Ralph* v. *Warden, Maryland Penitentiary,* 438 F.2d 786, 793 (4th Cir. 1970), where the Court stated: "In most jurisdictions, death is now considered an excessive penalty for rape. This has been demonstrated by the legislative trend to abolish capital punishment for this crime and by the infrequency of its infliction in jurisdictions that still authorize it."

In amending §41-3403, the Arkansas Legislature invested in the trial jury discretion to impose a sentence ranging from thirty years to life imprisonment. In doing so, however, the Legislature unfortunately failed to set out cognizable standards or guidelines which would enable a jury to proportion and grade penalties in relation to the circumstances of a particular case. Thus, an Arkansas jury has the freedom to levy the most severe penalty—life imprisonment without parole—where the offense resulted in no physical injury to the victim, as in the instant case, or it may impose the minimum penalty for an identical offense as in the case of *McDonald* v. *State, supra.*

Surely, the Legislature, in allowing such broad sentencing latitude, assumed that, in any given case, the jury would make an equitable and balanced judgment as to the sentence to be imposed. However, a brief examination of the record and the factual circumstances attending the act of the Petitioner makes apparent that the jury in this case did not arrive at an equitable and balanced determination devoid of "passion and prejudice." *Blake* v. *State*, 244 Ark. 37 (1968).

In determining whether Appellant's sentence of life imprisonment is excessive and out of proportion to his illegal act, several factors are material and relevant. A prime consideration obviously is the nature and gravity of the offense itself—whether it resulted in injury to the person or property. See: *Weems* v. *United States, supra* at pages 358, 366; *Carson* v. *State, supra.*

The opinion of Circuit Judge Butzner in *Ralph* v. *Warden, Maryland Penitentiary, supra* is instructive in this regard. In that case, the Petitioner had been convicted of rape in the first degree. Although there was no permanent injury to the victim, Petitioner was sentenced to

death under a Maryland statute similar to that at issue in this case. The Court of Appeals formulated the issue on appeal as follows:

> "Maryland's legislature enacted penalties for rape that range from eighteen months imprisonment to death. At issue, therefore, is the constitutionality of the trial courts' selection of the death penalty for the alternatives allowed by the statute in a case where the convicted rapist has neither taken nor endangered life."

The Court concluded that, in view of the particular circumstances of the case, the death penalty was disproportionate to the offense. *Id.* at page 794.

It is clear that the Prosecutrix in the instant case suffered no serious temporary or permanent physical injury. The testimony of Dr. Douglas Smith, examining physician, was conclusive on this point (R.701-2).

Another factor the trial jury should have taken into account was the youth of the Petitioner. At the time of the offense and indictment, Petitioner was only sixteen years of age. At the time of his trial and sentencing, he was only seventeen years of age.

Under Arkansas Statutory Law, a criminal offender under the age of eighteen years is regarded as a "delinquent child," Ark. Crim. Proc. §§45-204, 201, a designation entitling such defendants to special consideration.[7] When such "delinquent" children are adjudged first offenders, their treatment is based on a consideration of their youth and the positive prognosis for reclamation and reformation. Yet, Petitioner herein was not given the benefit of

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[7] E.g. Ark. Stat. 45-225 which stipulates segregation of delinquent children; Ark. State §43-2807 (c) (2), which provides for parole at any time where there is a term of years.

such enlightened policy.[8] Though a "delinquent child" rather than a hardened criminal, though a first offender rather than a proven incorrigible, Petitioner was condemned to a lifetime of imprisonment.

> "More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like,' are, of course, 'attended with acute pain and suffering.' O'Neil v. Vermont, 144 U.S. 323, 339, 36 L.Ed. 450, 458, 12 S.Ct. 693 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they are thus inconsistent with the fundamental premise of the

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[8] That the State of Arkansas has a special concern for juvenile offenders is made clear by Ark. Stat. §45-233, entitled "liberal construction," which states:

> "Liberal construction—This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of the child shall approximate as nearly as may be that which should be given it by its parents, and in all cases of dependency where it can properly be done, that the child shall be placed in an approved family home, and become a member of a home and family be legal adoption or otherwise, *and in cases of delinquency, that as far as practicable, any delinquent child shall be treated not as a criminal, but as misdirected and misguided and needing aid, encouragement and assistance, and if such child cannot* be properly cared for and corrected in its own home or with the assistance and help of the probation officers, then that it may be placed in a suitable institution where it may be helped and educated and equipped for industrial efficiency and useful citizenship." (Acts 1911, No. 215 §17, p. 166; C. & M. Dig., §5778; Pope's Dig., §7493). Compiler's Note.

> Clause that even the vilest criminal remains a human being possessed of common human dignity.
> The infliction of an extremely severe punishment, then, like the one before the Court in Weems v. United States, from which '[n]o circumstances of degradation [was] omitted,' 217 U.S., at 366, 54 L.Ed. at 798, may reflect the attitude that the person punished is not entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself."

These are the words of Justice Brennan concurring in *Furman* v. *Georgia, supra* at page 366. Certainly they are appropriate herein, for is not Petitioner being treated as a "non-human", an abhorrent misfit in the society of man who is to be "discarded"?

Clearly, such is the effect, if not the underlying, conscious intent, of Petitioner's sentence herein. And it is equally appropriate of juvenile offenders in the State of Arkansas. The lenient parole provisions for persons under 21 years of age was undoubtedly intended by the Legislature to afford juvenile offenders an opportunity to escape the physical and psychological shocks resulting from a prison sentence. See: Ark. Stat. §§43-2807(c) (2). See also: Ark. Stat. §45-233, *supra* n. 3.

Thus, the trial jury, in sentencing a juvenile to life imprisonment without any opportunity for parole, essentially determined Petitioner to be a "non-person," bereft of all human worth, incapable of being rehabilitated. Petitioner prays that this Court follow the precedent it has laid and reject such a nefarious and primitive view.

The applicable principle of law in this case was applied by the Kentucky Supreme Court in *Workman* v. *Common-*

wealth, —— Ky. ——, 429 S.W.2d 374 (1968). In that case two 14 year old defendants were convicted of rape in the first degree and sentenced to life imprisonment without parole. In reversing, the Kentucky Supreme Court stated:

> "In examining the petition of the applicants before us, we are of the opinion that life imprisonment without benefit of parole for two fourteen year-old youths under all the circumstances shocks the general conscience of the society today and is intolerable to fundamental fairness. The intent of the legislature in providing a penalty of life imprisonment without benefit of parole for the offense of rape undoubtedly was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen year-old youth, no matter how bad, will remain incorrigible for the rest of his life. Therefore, so much of KRS 435.090 as permits confinement without parole constitutes cruel and unusual punishment and is in violation of Section 1 of the Constitution when applied to a juvenile."

Id. at page 380, Accord: *Anderson* v. *Commonwealth*, —— Ky. ——, 465 S.W.2d.

Finally, it would be gross hypocricy and dishonesty to deny that Petitioner Rogers received the maximum penalty under the law herein because he was found guilty of violating a fundamental sexual taboo of this society—sexual relations with a white woman. See: Discussion, *supra*. See also: *McDonald* v. *State*, *supra* where a white individual in the identical circumstances received the ***minimum*** penalty allowed.

Petitioner's claim that such racial feeling affected drastically his sentencing by an all-white jury is supported statistically as well. In 1964, the NAACP Legal Defense and Education Fund, Inc. engaged a highly qualified sociologist and criminologist to conduct a study of rape conviction in a number of southern states, including Arkansas. The purpose of the study was to prove or disprove the thesis that, in those states, the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women.

While the study, known as the "Wolfgang Study" is not in authoritative, published from so as to be cited herein, this Court should be aware of its contents. It was presented as evidence in the habeas corpus proceeding entitled *Maxwell* v. *Bishop,* 398 F.2d 138 (8th Cir., 1968). The Appellant in that case had been convicted of rape and sentenced to death; and the conviction was affirmed in *Maxwell* v. *State,* 236 Ark. 694, 370 S.W. 2d 113 (1963). The conclusion of the study, arrived at after an exhaustive survey of nineteen counties in Arkansas of which Sebastian County was one, was unequivocal: "Compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death." See Appendix at page A36.

Petitioner proffers the above not as ironclad proof of prejudice on the part of the jury that convicted him, but simply as an additional leg supporting the inference that his unduly harsh sentence was more the result of community and racial passion than calm and objective deliberation. However, stronger proof that passion, bias, and fear was operative in this particular case are statements of the trial judge himself. In ruling on a motion to reduce Petitioner's bond, the trial judge stated, inter alia:

"I can't help but want to tell you all that these events occurring at these shopping centers here—and there were at least—there was another one besides this one reported—caused great alarm and consternation in this community. It's one of the few times I've ever had my phone ringing—'What's happening at these shopping centers? And what are you going to do about it?' The women were afraid to go to the shopping centers around here. After that trial I had calls—'Are you going to let that man out?' The people are alarmed" (R.14-5).

In view of the foregoing discussion, then, it is apparent that the penalty imposed herein, if not the conviction itself, was the result of an inflamed community sentiment and the product of an unfortunate historical past in race relationships in this country, generally, and Arkansas, specifically.

Because of growing enlightenment in the latter respect, particularly, it is imperative that this Court declare the imposition of the life sentence herein, without parole, as excessive in view of the circumstance of the alleged assault, without bodily harm, and the age of the alleged assailant; and remand to the trial court for further deliberation in this regard.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

/s/ George Howard, Jr.
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Attorneys for the Petitioner

Certificate of Service

James I. Meyerson, one of the attorneys for the Petitioner herein, certifies that on the 13th day of February, 1975 I did serve two copies of the foregoing on the Attorney General of the State of Arkansas by mailing the same, first class, postage prepaid, registered, to: Mr. Jim Guy Tucker, Attorney General of the State of Arkansas, State Capitol Grounds, Little Rock, Arkansas. In addition, I did serve a copy of the foregoing Petition upon the Honorable Paul Wolfe, Circuit Judge, Sebastian County Courthouse, Forth Smith, Arkansas, by mailing the same to him, as described above. Finally, I did serve a copy of the foregoing Petition on the Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas, by mailing the same, postage prepaid, first class, registered, to Mr. Charles Karr, Prosecuting Attorney, Twelfth Judicial Circuit of Arkansas, Sebastian County Courthouse, Forth Smith, Arkansas.

Respectfully submitted,

/s/ James I. Meyerson
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(212) 245-2100
Attorney for Petitioner

Appendix "A"

November 18, 1974

The Honorable George Howard, Jr.
329 1/2 Main Street
Pine Bluff, Arkansas

Re: Howard Eugene Rogers
v. State of Arkansas
Case #CR74-59

Dear Mr. Howard:

By direction of the court, you are advised that on the eighth page of the opinion, third line from the bottom, the words "and rapid" should be deleted.

Very truly yours,

/s/ JIMMY H. HAWKINS
Jimmy H. Hawkins

CC: West Publishing Company
50 Kellogg Boulevard
St. Paul, Minn. 55102

Miss Sharon Bernard Miller
Nathaniel R. Jones
James I. Myerson
George E. Hairston

Appendix "B"

PAUL WOLFE
CIRCUIT JUDGE
TWELFTH JUDICIAL CIRCUIT
FORT SMITH, ARKANSAS 72901

August 15, 1973

CERTIFIED MAIL

Mr. George Howard, Jr.
Attorney at Law
Post Office Box 8249
Pine Bluff, Arkansas 71601

Mr. James Meyerson and
Mr. Nathaniel Jones
1790 Broadway
New York, New York 10019

Ms. Sharon B. Miller
Attorney at Law
Post Office Box 376
Helena, Arkansas 72342

Mr. Charles Karr
Prosecuting Attorney
County Court House
Fort Smith, Arkansas 72901

RE: State of Arkansas vs. Harold Eugene Rogers
Criminal Docket Nos. 2056 and 2057

Ms. Miller and Gentlemen:

I have considered the defendant's "Motion For Presiding Judge To Disqualify" and memorandum briefs submitted in support of and in opposition thereto and the motion is hereby denied.

The attention of all counsel is directed to the court's letter order of July 13, 1973, setting August 13, 1973, as a deadline for the filing of any type of motion or of all matters pertaining to the case. In view of the facts that all motions filed heretofore have been ruled upon and no further motions have been received from either side since

Appendix B

August 13, 1973, the court now deems that all other motions are waived and, if filed, will be rejected as untimely.

As previously stated the case will be called for trial at 9:00 A.M., Monday, August 27, 1973.

This communication is to be regarded as a letter order constituting a part of the record.

Counsel are directed to acknowledge receipt of this letter by return mail. This direction is being underscored because of counsel's failure to observe a similar request as to the letter of July 13, 1973.

Very truly yours,

PAUL WOLFE
Circuit Judge

cc: Mr. Harold Eugene Rogers
County Jail, 615 Parker
Fort Smith, Arkansas 72901

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SUPREME COURT, U. S.

FILED
FEB 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1004

HAROLD EUGENE ROGERS,

Petitioner,

—v.—

THE STATE OF ARKANSAS,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Majority Opinion of Supreme Court of Arkansas

SUPREME COURT OF ARKANSAS

No. CR 74-59

Opinion Delivered October 21, 1974

HAROLD EUGENE ROGERS,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

APPEAL FROM SEBASTIAN CIRCUIT COURT,
FORT SMITH DISTRICT, PAUL WOLFE, *Judge*

Affirmed

FRANK HOLT, *Associate Justice*

A jury convicted appellant of first degree rape (Ark. Stat. Ann. § 41-3401 [Supp. 1973]) and assessed his punishment at life imprisonment in the State Department of Correction. For reversal of that judgment appellant first contends that the trial court erred in not allowing sufficient voir dire examination by his defense counsel to permit an intelligent exercise of his right to make an informed decision whether to challenge the veniremen peremptorily or for cause.

The purpose of voir dire examination is to provide the litigants sufficient information about the proposed juror to intelligently exercise their challenges peremptorily or for cause. *Griffin* v. *State,* 239 Ark. 431, 389 S.W.2d 900

(1965). The due process clause of the federal Fourteenth Amendment requires that counsel be permitted to interrogate the prospective jurors about racial bias. *Ham* v. *South Carolina*, 409 U.S. 524, (1973). In *Cochran* v. *State*, 256 Ark. ——, 505 S.W.2d 520 (1974), two defendants were convicted of assaulting a white officer during an assemblage or riot. The court generally inquired of the jurors as a group whether the difference in race would tend to influence their verdict. Their silent response was accepted by the court as indicating the racial difference would not influence their verdict. The defense counsel was not permitted to inquire into possible racial prejudice. There we held the trial court abused its discretion by unduly restricting the voir dire.

In the case at bar the appellant is a black man and the rape victim is a white woman. In two instances appellant asserts specifically that his voir dire was unduly restricted. The first example relates to the examination of prospective juror Siebenmorgan. The appellant's defense counsel, without objection or interruption by the court, was permitted to propound questions bearing directly on the issue of his mental attitude toward any racial bias. Siebenmorgan responded that he did not "have any racial prejudice;" he would not "believe a white police officer any more than [he] would believe a black man;" he would not "believe a white woman any more than [he] would believe a black man;" he did not "think there's any difference between black people and white people;" his children attended "public schools" which are "integrated;" he is a Catholic and there are "black members" in his church; he has never had an unfortunate experience with a black man and neither had his family; and he had never had any problem with "interracial social gatherings." Then the

question was propounded "would you have any problem with your daughter dating a black man?" The court then remarked that he did not think this type of questioning "has anything to do with this law suit." However, he then permitted the question to be answered. The juror responded that it would present a problem. However, the prospective juror then assured defendant's counsel that the problem "would have no bearing on this case." When the counsel persisted in this type of questioning, the court stated "[N]ow, I think we've gone into that far enough. You've asked him enough. As I explained at barside here, I think I've allowed counsel great latitude * * * *."

The other example asserted as being too restrictive of voir dire examination relates to prospective juror Bartley. Appellant's counsel was permitted to question him with reference to racial prejudice. In answer to these questions this prospective juror stated that he didn't "have any racial prejudice;" there is no "difference between a black and white person" except "color;" he did not believe black people are "lazier" or "less intelligent" than white people; he did believe black people were "better athletes" than white people. Thereupon the trial court interrupted and said it was not necessary to answer that question since it was not proper voir dire.

As previously indicated, appellant contends that his counsel should have had the right to further pursue the interrogation of these witnesses in order to make an informed decision as to whether to challenge these jurors peremptorily or for cause. In other words, his counsel was not permitted to show "subtle prejudices" or "subjective racism" which these two jurors might have. It is well established that the trial court is accorded a wide discretion in determining the extent or scope of the interrogation of prospective jurors. *Lauderdale* v. *State*, 233 Ark. 96, 343 S.W.2d

422 (1961). There the defendant was being tried for dynamiting a building during a racial school crisis. After extensive questioning of the jurors by defense counsel as to their racial views, the trial court refused to permit the question "are you a segregationist or an integrationist" to be propounded to the jurors. There we said that such a question "would have no bearing on his fairness as a juror to sit in the trial of a case being tried for dynamiting a building" and "would inject an issue not pertinent to testing the capacity and competency of the jurors and would have tended to create a bias or prejudice that would also have embarrassed the veniremen."

In the case at bar, the transcript reveals that the voir dire consisted of approximately 473 pages and the court permitted most of this to be conducted by the defense counsel. In our view the trial court accorded the defense counsel great latitude in questioning the prospective jurors in a searching inquiry as to the existence of any subtle or subjective bias that would prevent a juror from rendering a fair and impartial verdict. The appellant has not demonstrated that he was denied any fundamental fairness in interrogating the jurors in order to make an informed decision whether to challenge the veniremen peremptorily or for cause. The trial court did not abuse its discretion.

Appellant also asserts that it was error since the trial court failed to interrogate the prospective jurors about their racial attitudes, citing *Ham* v. *South Carolina*, *supra*. We do not consider this case applicable in the case at bar inasmuch as the statutory framework in that state provides for the voir dire examination of potential jurors be conducted by the court after accepting questions from the attorneys. That does not exist in our state. *Griffin* v. *State*, *supra*. Furthermore, the appellant has not demonstrated

that the trial court was ever asked to conduct the voir dire examination. Therefore, the issue is raised for the first time on appeal and cannot be considered. Appellant's defense counsel, as previously indicated, was permitted to question extensively the prospective jurors with reference to any possible racial bias.

Appellant next asserts that the "trial court erred in denying defense counsel's motion for a mistrial based on the state's exercise of its peremptory challenges to systematically exclude black persons from the jury in violation of the appellant's Fourteenth Amendment rights." Six of the seven prospective jurors which were peremptory challenged by the state were black. This resulted in an all white jury. In *Swain* v. *State of Alabama,* 380 U.S. 202 (1965), a black man was convicted of raping a white woman and sentenced to death. All six prospective black jurors were struck by the prosecutor by peremptory challenges. In affirming the conviction the court held that this procedure did not constitute a violation of the Fourteenth Amendment, ". . . we cannot hold the striking of negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." ". . . [We] cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." In *Jackson* v. *State,* 245 Ark. 331, 432 S.W.2d 876 (1968), we followed *Swain* and stated the rule to be "[T]he mere fact that the state peremptorily challenged all the Negroes on the petit jury does not constitute a showing that any of appellant's constitutional rights were violated."

It appears that the prosecutor categorically denied that he was using his peremptory challenges merely to exclude

blacks. The voir dire examination of the prospective black jurors peremptorily challenged by the state revealed that all of them except one were acquainted with either the appellant or members of his family. It appears that the other juror was reluctant to serve. The record reflects that blacks have consistently served as trial jurors. In *Swain, supra,* Justice White, writing for the majority, said:

> Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hayes* v. *Missouri,* 120 U.S. 68 (1887).

See also *Green* v. *State,* 222 Ark. 222, 258 S.W.2d 56 (1953). In the case at bar, we hold appellant has not demonstrated any systematic misuse by the state of its right to exercise its peremptory challenges.

Two prospective black jurors arrived late for the empanelment and they were not included in the drawing for the initial 24 jurors. Upon arrival their names were included "in the box." However, the initial empanelment was not redrawn as requested by appellant. Furthermore, appellant complains that two black jurors did not report for jury duty because they were out of town or could not be contacted. There is no evidence whatsoever that the tardiness of the two jurors or the absence of others was due to any act on the part of any official of the state. Such a factual situation does not constitute a systematic exclusion from the jury. *Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Appellant next argues that there was an unwarranted reprimand to his defense counsel at a crucial point in the

trial and that the court failed to maintain an impartial hearing, generally, throughout the proceedings. The following occurred on cross-examination of the prosecutrix:

Q. You remember who pulled it out? [tampax] A. I pulled it out. I told him I was on my period, and I pulled it out. I didn't want him to push it up any farther inside me.

Q. When did he do his talking about Kansas City? A. After he got through. After he reached his climax he set up and made me sit in his lap naked.

Q. How long did this take from the time that he put it in until— A. Just a very short time.

Q. What were you doing? A. I wasn't doing anything, I was just laying there.

Q. Where were your hands? A. I don't know.

Q. Scratching? A. No, I don't know.

Q. Biting? A. No.

Q. Kicking? A. No.

Q. Kissing? A. No.

Q. Petting? A. No.

Q. Did you scream out? A. No.

Q. Why did you not cry? A. I'm just not that way. When I'm scared I just don't say anything.

Q. Are you scared now? A. Yes.

Q. Is it hard for you to cry now? A. No.

Q. While you were sitting in his lap where were your hands? A. Around his neck.

Mrs. Miller: Your Honor, maybe the prosecutrix would like a few minutes.

The Court: I beg your pardon?

Mrs. Miller: Maybe the prosecutrix would like a few minutes to get herself together.

The Court: Well, you got her this way. Why don't you go ahead.

Mr. Myerson: Your Honor, the defense would like to point out that we're not intentionally attempting to get her this way, and we would like for her to have an opportunity to get herself together.

The Court: I didn't know she appeared to be so distraught. Do you wish to recess?

A. No.

The Court: I beg your pardon?

The prosecutrix then said "I can finish." Thereupon the appellant's counsel moved for a mistrial on the basis of the court's remark before the jury that the "defense counsel having got this witness that way" is "highly prejudicial" which could not be removed from the juror's minds by a cautionary instruction. The court denied the motion. Appellant argues that the court's remak ridiculed the defense counsel and demonstrated a biased attitude which tended to adversely affect the appellant's rights before the jury. Prejudicial error is not committed by the court's remark unless it constitutes an "unmerited rebuke" giving the jury the impression that defense counsel is being ridiculed. *Davis* v. *State*, 242 Ark. 43, 411 S.W.2d 531 (1967); *McAlister* v. *State*, 206 Ark. 998, 178 S.W.2d 67 (1944); *Jones* v. *State*, 166 Ark. 290, 265 S.W. 974 (1924). However, prejudice is not shown where the record reveals that the trial judge was merely irritated at defense counsel's trial tactics. *Walker* v. *Bishop*, 408 F.2d 1378 (8th Cir. 1969). Although the better practice, as we have often said, is to talk to counsel out of the jury's hearing, we do not construe this remark as ridiculing the appellant's counsel.

The court merely was stating the obvious. By terse and rapid questioning on cross-examination, the defense counsel was properly attempting to weaken the prosecutrix's testimony as a witness. The court's remark certainly did not relate to the merits of the case. At most, it could only be construed as a mere irritation which "does not constitute reversible error whether the court's irritation was justified or not." *Walker* v. *Bishop, supra.*

Further, where evidence of the defendant's guilt is convincing, we have affirmed convictions in spite of the fact that remarks made by the trial court were said to be improper. *Bates* v. *State*, 210 Ark. 1014, 198 S.W.2d 850 (1947); *Tuttle* v. *State*, 83 Ark. 379, 104 S.W. 135 (1907); and 62 ALR2d 206. In *Tuttle* the court stated to appellant's counsel "[T]hat is not the rule of evidence, and not the law, and never was the law, and you know it. * * * This is not a backwoods justice-of-the peace court, and I will not take up the time of the court with such questions." In the case at bar the evidence, which we later discuss, is amply sufficient to convince us that the verdict is responsive to the evidence and not to any extraneous matter such as the asserted prejudicial remark by the trial court. Moreover the court instructed the jury pertinent to this issue:

> I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything I have done or said has seemed to so indicate, you will disregard it.

Appellant contends that the trial court continually showed bias, making it impossible to conduct a fair and impar-

tial trial. The record shows otherwise. A large part of the record contains the voir dire proceedings where the prospective jurors were questioned at length as to racial attitudes. The trial court permitted a sufficient inquiry of the jurors to insure that appellant obtained a fair and impartial jury. The appellant complains only of two exceptions which we have previously discussed. The court cut bail in half and was willing to talk to counsel about reducing it further. In chambers the court remarked:

> This is the first time in my nineteen years as a judge that this [racism]—such a thing has been raised. I regret that it has been raised. We all try to get along together and live together, and help one another, But the most important thing in the world, in this courtroom, is to have the proper atmosphere in which to ascertain the truth, whatever the truth may be, and that's what I, as presiding judge, want.

Appellant's argument as to the bias of the trial court relates primarily to proceedings not in the jury's presence. Suffice it to say that we are of the view the trial was conducted in a fair and impartial manner.

Appellant next asserts for reversal that the trial court erred in admitting into evidence the testimony of Sonja Suter. We do not agree. Since the prosecutrix was unable to identify appellant, Mrs. Suter's testimony was permitted. In *Tarkington* v. *State*, 250 Ark. 972, 469 S.W. 2d 93 (1971), we held:

> If the crime charged has been committed by a novel means or in a particular manner, and the identity of its perpetrator is in issue and not otherwise conclusively established, evidence of a defendant's commission of a similar offense by that means or in such

> manner is admissible as tending to show identity of the perpetrator when the similarity of the means or manner employed logically operates to set the offenses apart from other crimes of the same general variety and tends to suggest that the perpetrator of one was the perpetrator of the other.

See also *King* v. *State*, 253 Ark. 614, 487 S.W.2d 596 (1972); and *Montgomery* v. *State*, 251 Ark. 645, 473 S.W. 2d 885 (1971). In the case at bar, Mrs. Suter testified she was raped the night after the prosecuting witness was attacked. The circumstances of the alleged assaults are similar. Both victims were returning to their cars at nighttime from a grocery store when a black man, at gunpoint, abducted, blindfolded, and forced each of them to put their heads down as he drove their car to a garage where he raped them. Each was driven back to the grocery store parking lot and released. Appellant contends he did not offer an alibi or refute the charge, and another witness placed him at the scene of the crime. Therefore, appellant says his identity was not in issue, and Mrs. Suter's testimony was inadmissible. The prosecuting witness, however, could not identify her assailant. The other witness, who observed him at the scene, merely testified that he saw appellant with a white girl. Appellant's identity was not "conclusively established" as the person who raped the prosecutrix. Mrs. Suter did identify appellant as the person who raped her the following night under similar circumstances. Therefore, we hold her testimony was relevant upon the issue of identity.

Appellant next contends that the evidence is insufficient to support the verdict of the jury. We first observe it is well established that on appeal we review the evidence and all reasonable inferences deducible therefrom most

favorable to the appellee and affirm if there is any substantial evidence to support the jury's finding and verdict. *Stanley* v. *State*, 248 Ark. 787, 454 S.W.2d 72 (1970). At approximately 9 p.m., the prosecutrix went to a grocery store to cash a check. When she returned to her car a black male accosted her with a gun, placed a cap over her face and forced her to ride on the passenger side with her head down. He then drove her car to a garage where he pushed her inside and onto a couch where she was told to undress. After undressing himself, he proceeded to fondle various parts of her body. She was required to remove a tampax and then he proceeded to have sexual intercourse with her without her consent. She did not struggle because she was fearful he would kill her. Afterwards her assailant drove her in her car back to the grocery store parking lot where she was released. She could not identify him although she got a glimpse of the surroundings at the garage and a momentary view of the interior of the garage. There was medical proof of recent intercourse. Since the prosecutrix could not identify the appellant as her assailant, Mrs. Suter was permitted to testify based upon the issue of identify. She identified the appellant as being the one who raped her the following night under similar circumstances. Both victims were able to identify the garage as being the place where the assaults were made upon them. There the tampax was found that the prosecutrix was forced to remove and a part of a thermometer case which had fallen out of Mrs. Suter's purse was also recovered. We hold the evidence was amply substantial to support the jury's findings that the prosecutrix was sexually assaulted in violation of Ark Stat. Ann. § 41-3401 (Supp. 1973).

Appellant next asserts that a "sentence of life imprisonment without an opportunity for parole, imposed upon a first-offender minor, whose offense resulted in no physical harm to the victim, was so excessive and disproportionate to the illegal act as to constitute cruel and unusal punishment." We cannot agree. Appellant, 17 years old at the time of trial, was sentenced to life imprisonment for first degree rape pursuant to Ark. Stat. Ann. § 41-3403 (Supp. 1973). However, a life sentence does not absolutely preclude the opportunity for parole. Ark. Stat. Ann. § 43-2807 (b) (Supp. 1973) provides for parole eligibility upon commutation to a term of years by executive clemency. Thereupon, the individual is "elegible for release on parole after serving one-third (⅓) of the time to which the life sentence was commuted, with credit for good time allowances." Until recently the penalty for rape was death or life imprisonment. However, by Act 362 of 1967 (41-3403, *supra*) the legislature provided that "[A]ny male, upon conviction of first degree rape, shall be subject to death or thirty (30) years to life imprisonment in the state penitentiary." Therefore, the legislature permitted the jury the latitude of fixing a lesser sentence than formerly. Appellant presents the argument that the punishment of life imprisonment fixed by the jury is too harsh and cruel because the prosecutrix suffered no serious or permanent physical harm. Appellant recognizes that no one can deny that rape is one of the most morally reprehensible criminal offense and, historically, the act has been the subject of the most severe penalties and public condemnation. In the case at bar, as previously indicated, the prosecutrix was abducted at gunpoint, subjected to indignities and raped. The jury is in the better position to evaluate the physical abuse as well as any

mental anguish experienced by the prosecutrix as a result of her ordeal. Appellant acknowledges that recently in *McDonald* v. *State*, 253 Ark. 812, 491 S.W.2d 36 (1973), we reaffirmed the generally prevailing view that if a sentence is within the limits established by the legislature, it is valid even though it is insisted that the punishment is unconstitutionally excessive. There we said "[I]nasmuch as the determination of the limits of punishment lies peculiarly within the legislative province, we have no basis for disturbing the verdict." To the same effect is *Osborne* v. *State*, 237 Ark. 5, 371 S.W.2d 518 (1963); *Randle* v. *State*, 245 Ark. 653, 434 S.W.2d 295 (1968); and *Paterson* v. *State*, 253 Ark. 393, 486 S.W.2d 19 (1972).

In the case at bar, the testimony, as previously discussed, is amply substantial to support the jury verdict. The punishment assessed was within the limits prescribed by law and less than the maximum. It was for the jury to exercise the right end authority vested in it by our legislature and constitution. Therefore, we hold that the penalty imposed by the jury is not cruel and unusual punishment. As previously indicated a life sentence is not without any opportunity for parole eligibility since executive clemency is available by a commutation of sentence.

Affirmed.

Byrd, *J.*, dissents.

Dissenting Opinion of Supreme Court of Arkansas

SUPREME COURT OF ARKANSAS

No. CR-74-59

Opinion Delivered Oct. 21, 1974

HAROLD EUGENE ROGERS,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

Dissent

CONLEY BYRD, *Associate Justice*

I would reverse and remand this case for a new trial because of the trial court's remarks to appellant's counsel during the cross-examination of the prosecutrix. It must be remembered that the burden was upon the State to prove to the jury beyond a reasonable doubt that appellant had intercourse with the prosecutrix "by forcible compulsion."

Mac Chambers, a witness called by the State, testified that he lived near the garage where the alleged rape took place and that on the night of October 31, the defendant asked the witness to take him to Piggley Wiggley. When the witness got outside the defendant got in a car with a white girl and the witness followed the defendant to Piggley Wiggley. Upon arrival at the Piggley Wiggley, the defendant sat in the car and talked to the girl awhile before he got into the witness' car. The next night at about the same time the appellant and a white girl walked upon the

porch where the witness lived. This time at the request of appellant, witness followed appellant to Kroger. Witness described the girl on the second night as smiling when he saw her. Stated that the girl was not scared. Witness also testified that there were a number of stop signs between his house and the Piggley Wiggley and that appellant stopped at each stop sign.

On direct the prosecutrix had testified that upon arriving at a garage the appellant tied her hands behind her back with a rope and pulled my blouse, that I was wearing, over my face. On cross-examination the prosecutrix stated appellant started to take off my blouse at first, but I just took it off myself. Thereafter, the cross-examination continued as set out in the majority opinion and culminated with the prosecutrix testifying that she was sitting on the appellant's lap while nude and with her arms around his neck. At that time the following occurred:

> "Mrs. Miller: 'Your Honor, maybe the prosecutrix would like a few minutes.'
>
> The Court: 'I beg your pardon?'
>
> Mrs. Miller: 'Maybe the prosecutrix would like a few minutes to get herself together.'
>
> The Court: 'Well, you got her this way. Why don't you go ahead.'"

These remarks on the trial court, although not necessarily intended, could be construed as showing some irritation in counsel's manner of interrogation and that it went beyond the bounds of propriety. In dealing with a remark of a trial court to counsel in *McAlister* v. *State*, 206 Ark. 998, 178 S.W. 2d 67 (1944), we stated the general principle as follows:

Dissenting Opinion of Supreme Court of Arkansas

> "'No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other.' 'We are not unaware that many things occur during the trial of a case to fray and irritate the nerves of the presiding judge, and that he is not immune to the natural frailties of humanity, but because of his position he must exercise the greater forbearance and patience.'"

We constantly hold that there is a presumption that every error is prejudicial, unless it is demonstrated otherwise. See *Arkansas Highway Comm.* v. *Jenson*, 253 Ark. 795, 489 S.W. 2d 5 (1973), where we stated:

> ". . . The presumption is that error is prejudicial unless it is shown otherwise or manifestly is not . . ."

The majority's bald assertion that they "do not construe this remark as ridiculing appellant's counsel" does not show that the court's demonstrated irritation had no effect in discrediting the testimony elicited on cross-examination. As pointed out in *McAlister* v. *State*, *supra*, a trial judge because of his great influence with the jury: "By his words

or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury." Here I cannot say that the record manifestly shows that the trial court's expressed irritation did not prejudice either Appellant's conviction or the extent of his punishment. It certainly did not help appellant. Consequently I would reverse for a new trial on this one issue.

For the reasons stated I respectfully dissent.

Petition for Rehearing

IN THE

SUPREME COURT OF ARKANSAS

No. CR 74-59

HAROLD EUGENE ROGERS,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

PETITION FOR REHEARING

Comes the appellant, Harold Eugene Rogers, by and through one of his attorneys, George Howard, Jr., and petitions the Court for a rehearing and a reconsideration of the decision rendered in this cause on October 21, 1974, affirming his conviction in the Sebastian Circuit Court, Fort Smith District, and for cause, states:

1. That the Court erred in finding that the trial court did not commit reversible error in not allowing sufficient voir dire examination to permit defense counsel to make an intelligent exercise of its peremptory challenges.

2. The Court erred in finding that the trial court did not commit reversible error in denying defense counsel's motion for a mistrial based on the State's systematic exclusion of black persons from the jury by the exercise of its peremptory challenges.

3. The Court erred in not reversing appellant's conviction because of the trial court's remarks to appellant's counsel during the cross-examination of the prosecutrix, which was in effect an unwarranted reprimand to appellant's defense counsel at a crucial point in the trial. Moreover, the Court further erred in making a finding, not based upon the four corners of the record in this cause ". . . The Court merely was stating the obvious. *By terse and rapid questioning* on cross-examination, the defense counsel was properly attempting to weaken the prosecutrix's testimony as a witness. The Court's remark certainly did not relate to the merits of the case. At most, it could only be construed as a mere irritation . . ." (Court's Opinion, page 8). Emphasis Supplied. On the contrary, appellant's counsel, during the whole time that prosecutrix was under cross-examination, refrained from "terse and rapid questioning" of the prosecutrix. Indeed, the Court, in order to make the aforementioned finding, was required to depart from the written record.

Appellant would further submit that as a result of the holding of the Court, the rule of law in this State with reference to the latitude that a trial judge has in situations under discussion is unclear and equivocal. *See: Simmons* v. *Arkansas Highway Department,* decided November 4, 1974.

4. The Court further erred in not finding reversible error in the trial court's denial of appellant's motion to the effect that the trial judge should disqualify himself in order to accord appellant a fair and impartial trial.

5. The Court further erred in finding that the trial court did not err in admitting into evidence the testimony of Sonja Suter.

6. The Court further erred in finding that the evidence was sufficient to support the verdict of the jury.

7. The Court further erred in holding that the life sentence imposed in appellant's case is not cruel and unusual punishment.

WHEREFORE, appellant prays for a rehearing.

By /s/ GEORGE HOWARD, JR.
One of the Attorneys for Appellant

I, George Howard, Jr., one of the attorneys for appellant, hereby state that it is my belief that this Petition for Rehearing has merit and that this Petition is not being filed for the purpose of delay.

/s/ GEORGE HOWARD, JR.

Subscribed and sworn to before me this 5th day of November, 1974.

/s/ VELORIA V. WATTEY
Notary Public

My Commission Expires:
March 27, 1977

Letter of November 18, 1974

November 18, 1974

The Honorable George Howard, Jr.
329½ Main Street
Pine Bluff, Arkansas

Re: Harold Eugene Rogers
v. State of Arkansas
Case #CR74-59

Dear Mr. Howard:

By direction of the court, you are advised that on the eighth page of the opinion, third line from the bottom, the words "and rapid" should be deleted.

Very truly yours,

/s/ Jimmy H. Hawkins
Jimmy H. Hawkins

CC: West Publishing Company
50 Kellogg Boulevard
St. Paul, Minn. 55102

Miss Sharon Bernard Miller
Nathaniel R. Jones
James I. Myerson
George E. Hairston

Certificate of Service

James I. Meyerson, one of the attorneys for the Petitioner herein, certifies that on the 20th day of February, 1975 I did serve two copies of the foregoing on the Attorney General of the State of Arkansas by mailing the same, first class, postage prepaid, registered, to: Mr. Jim Guy Tucker, Attorney General of the State of Arkansas, State Capitol Grounds, Little Rock, Arkansas. In addition, I did serve a copy of the foregoing Petition upon the Honorable Paul Wolfe, Circuit Judge, Sebastian County Courthouse, Fort Smith, Arkansas, by mailing the same to him, as described above. Finally, I did serve a copy of the foregoing Petition on the Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas, by mailing the same, postage prepaid, first class, registered, to Mr. Charles Karr, Prosecuting Attorney, Twelfth Judicial Circuit of Arkansas, Sebastian County Courthouse, Fort Smith, Arkansas.

Respectfully submitted,

/s/ James I. Meyerson
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New York, New York 10019
(212) 245-2100

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James I. Meyerson

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1004

HAROLD EUGENE ROGERS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 257 Ark. 144, 515 S.W. 2d 79 (1974) and is reproduced at page 1(a) of the Supplemental Appendix to the Petition.

JURISDICTION

The respondent is willing to stipulate that the jurisdictional requisites are adequately set forth in the Petition

QUESTIONS PRESENTED

(1) Whether the trial court erred in not allowing sufficient voir dire examination by defense counsel on the issue of the

racial prejudice of the potential jurors to permit an intelligent exercise of the peremptory challenge.

(2) Whether the trial judge exhibited such bias before the panel of the jury and otherwise that it deprived the Petitioner of an impartial trial and due process of law.

(3) Whether the sentence of life imprisonment without an opportunity for parole, imposed upon a first offender minor, whose offense resulted in no physical harm to the victim, is so excessive and disproportionate to the illegal act as to constitute cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) This case involves the Sixth Amendment to the United States Constitution.

(2) This case also involves the Eighth Amendment to the United States Constitution.

(3) This case also involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution (Section 2 of the Fourteenth Amendment).

(4) This case also involves relevant portions of Act 362 of 1967 Arkansas Legislature (Ark. Stat. Ann. § 41-3403 [Supp. 1973]), as set out below:

> "Any male, upon conviction of first degree rape, shall be subject to death or thirty (30) years to life imprisonment in the State Penitentiary."

(5) This case also involves relevant portions of the Arkansas Criminal Procedure as set forth in the Arkansas Statutes (Ark. Stat. § 43-2807(b), 1947), as set out below:

> "Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this Act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency."

STATEMENT OF FACTS

The petitioner Harold Rogers was convicted of first degree rape after a jury trial in the Circuit Court of Sebastian County, Arkansas, Fort Smith District. Evidence adduced at trial showed that the rape victim was abducted at gun point in a shopping center and driven to a garage where she was forced to have sexual intercourse with the petitioner. The petitioner did not testify at the trial. The jury recommended and the judge imposed a sentence of life imprisonment.

The Supreme Court of Arkansas affirmed the petitioner's conviction finding no merit in the claims he now seeks to present to this Court.

POINTS TO BE RELIED ON

I

THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL.

II

PETITIONER'S SENTENCE DOES NOT PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

ARGUMENT

I.

The decision below is clearly correct. None of Petitioner's constitutional rights were violated at trial.

The petitioner seeks to claim that the trial court did not allow sufficient voir dire examination on the issue of racial prejudice. The Arkansas Supreme Court after discussing the voir dire examination in this case stated:

> "In the case at bar, the transcript reveals that the voir dire consisted of approximately 473 pages and the court permitted most of this to be conducted by the defense counsel. In our view the trial court accorded the defense counsel great latitude in questioning the prospective jurors in a searching inquiry as to the existence of any subtle or subjective bias that would prevent a juror from rendering a fair and impartial verdict. The appellant has not demonstrated that he was denied any fundamental fairness in interrogating the jurors in order to make an informed decision whether to challenge the veniremen peremptorily or for cause. The trial court did not abuse its discretion." *Rogers* v. *State*, 257 Ark. 144 (1974), 515 S.W. 2d 79, 82.

An objective examination of the record in this case clearly establishes that the petitioner was given sufficient latitude in his voir dire as not to be denied any of his constitutional rights.[1] An examination of the complete voir dire of two jurors that petitioner uses as his examples to claim that there was undue restriction on voir dire fails to substantiate his claim.

---

[1] A total of thirty-six (36) prospective jurors were voir dired. The trial court only interfered with the voir dire examination of two jurors with respect to

Mr. Fred Siefenmorgen was asked the following questions before the trial court properly curtailed the examination; "Without belaboring that any more, sir, do you still adhere to your answer that you don't have any racial prejudice?" (T. 267); "Would you believe a white woman any more than you would believe a black man?" (T. 269-270); "Do you think there's any difference between black people and white people?"; "Do you live in an integrated neighborhood?"; and "Are there any black members in your church?"; "Have you ever had an unfortunate experience with a black man?"; and the questions

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questions concerning racial attitudes. The trial court allowed extensive questioning of the prospective juror as shown by the following examples. Mrs. Raymond Goodman was asked without interference, "Do you have any Negroes residing in your community?"; "Have you ever had an unfortunate experience either with a black person in your community or any place?"; "Would you give more credence or weight to the testimony of a white person than you would the testimony of a black person?" (T. 178); and whether she would give more credence to the testimony of a police officer than the testimony of a black witness. (T. 179). Mrs. Gilmer Dixon, without interference, was asked: "Do you have any problems with interracial social gatherings?"; "Do you have any problems with integrated schools?"; (T. 187) and "You feel you have any prejudice against black people?" (T. 188). Mrs. Earl Coff was asked, "Do you live in an integrated neighborhood?"; "Do you have any problem with integrated schools?"; "Do you have any black members in your church?"; and "Do you have any black social friends?" (T. 201) Mr. Gayle Autry was asked without interference from the court, "Have you on any occasion been in interracial social gatherings?"; [A]re there any black members of your church?"; (T. 300) "Would you give more credence to the testimony of a white person than you would the testimony of a black?"; (T. 301) "Do you think there's any difference between black people and white people?"; and "Would you mind if your son, when he became sixteen or seventeen, went out with a black woman?" (T. 302) Mr. Louis Seiter was asked the following two questions without interference by the trial court. "Would you have any problem with interracial dating, . . . ?" and "But you wouldn't want your children to do it, is that correct?" (T. 403) Mrs. Ed Rauser was asked, "Is the neighborhood in which you live integrated?" (T. 536); "Are there any black members in your church?"; "Have there been any black visitors to your church?" (T. 539); "You wouldn't believe a white person before you would believe a black person?" (T. 541); and "Have you or any members of your family ever been victimized by a black person." (T. 543) The respondent could recite other examples of the broad questioning allowed by the trial court, but will not burden the brief further.

reproduced on pages 16 and 17 of the Petitioner's brief.

The examination of Mr. William Bartley is the only other example used by the petitioner to substantiate his allegation of being denied the opportunity for proper voir dire. The respondent respectfully submits that a fair examination of the record doesn't support his claim. The transcript shows that the following questions were asked subsequent to that portion quoted in the petitioner's brief:

> "Would you tell me what your general attitude about black people is?"; "Do you think black people are generally less capable and qualified that white people?"; "Have you ever had an unfortunate experience with a black person or has any member of your family?" (T. 438); and "Would you give any more credence to the testimony of a white woman than you would to a black man?" (T. 439)

The respondent respectfully submits that the facts of this case that none of the cases cited by the petitioner are not controlling. In both *Ham* v. *North Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1972) and *Aldridge* v. *United States*, 283 U.S. 308, 75 L. Ed. 1054, 51 S. Ct. 470 (1931), this Court vacated the convictions because no voir dire was allowed concerning racial prejudice. As previously pointed out, the trial judge allowed extensive voir dire concerning possible racial prejudice on the part of prospective jurors. This Court in *Ham*, *supra*, U.S. at 527, S. Ct. at 833, L. Ed. 2d at 50, pointed out "that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do by petitioner. Since a trial court "has broad discretion as to the questions to be asked on voir dire, the respondent submits that the petitioner has failed to show an

abuse of this discretion, especially since petitioner's counsel was allowed to conduct the voir dire. *Aldridge*, *supra*, U.S. at 310, L. Ed. at 1056.

". . . [I]f the court permits counsel to conduct the voir dir, he need not permit unlimited inquiry into a specific area of prejudice." *United States* v. *Delay*, 500 F. 2d 1361, 1366 (8th Cir. 1974).

A number of courts have affirmed convictions in cases in which substantially less voir dire was allowed than in this case. See, *Delay*, *supra*; *United States* v. *Thompson*, 490 F. 2d 1218 (8th Cir. 1974); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); cert. denied, 415 U. S. 923, 94 S. Ct. 1426, 39 L. Ed. 2d 479 (1974); *United States* v. *Bamberger*, 456 F. 2d 1119 (1972); *Giles* v. *State*, 183 A2d 359, 229 Md. 370 (1972), cert. denied, 372 U.S. 767, 10 L. Ed. 2d 137, 83 S. Ct. 1102 (1963); and *State* v. *Brooks*, 111 S.E. 2d 636 (S. C. Supreme Court, 1959), cert. denied, 365 U.S. 300, 5 L. Ed. 2d 689, 81 S. Ct. 707 (1961).

In view of the foregoing, respondent respectfully prays that this Court will deny petitioner's request for a Writ of Certiorari based on the claim of improper restrictions of voir dire concerning racial prejudice.

(2) The petitioner seeks to claim that he was denied a fair and impartial trial due to alleged bias and reprimands of the trial judge. The respondent submits that the relevant portions of the transcript do not support this claim.

The respondent contends that only comments made by the judge in the presence of the jury are relevant to the question of whether the petitioner was denied a fair trial. This position by

the respondent is taken as under Arkansas law in a case tried by a jury, the trial judge can fix the length of sentence only when the jury fails to agree on the sentence. Ark. Stat. Ann. § 43-2306 (Repl. 1964). The jury was able to reach agreement in the sentence in this case.

Of the examples of alleged basis and unwarranted reprimands cited by the petitioner in his petition, only one of them occurred in the presence of the jury. The once occurring in the presence of the jury was the exchange during the cross-examination of prosecutrix and is found on pages 23 and 24 of petitioner's brief.

The following example found on pages 24 and 25 of the petition occurred during a barside conference out of hearing of the jurors that started on page 274 of the recorded and ended on page 282.

"MR. MEYERSON: Could I explain the reason that I was asking those questions?

"THE COURT: You've told me, he has told me. You have told me that you do not know yet whether it will be or not. I find that, sir — and I say this without meaning to offend you — difficult to believe . . (T. 277-8).

"MR. MEYERSON: We can certainly ask questions to ascertain whether or not he's racially prejudiced, in our opinion, for our client.

"THE COURT: Well, I'm not going to permit you to go on and on and on, and I'm telling you if you came here to get my goat and to get me to get an error in here, which

it's beginning to look a little bit like, then I can ride this just as long as you can. I haven't got anything — I'll cancel all my affairs for the next two weeks, and I can take my own sweet time about this (T. 279-80).

"MR. MEYERSON: If it's not racial prejudice, what is the reason he doesn't want his daughter — [to date a black man]

"THE COURT: Doesn't it speak for itself?

"MR. MEYERSON: No. If it's not racial prejudice, I'd like to know what it is. It's not very obvious to me."

62 ALR 2d 198-199 states:

"Since the main mischief, in the view of most courts, the results from an attorney's receiving harsh treatment at the hands of the judge is infection of the jury with animus towards the defendant, it is almost a corollary that if the jury does not become aware of the chastening, no error can occur; and the cases pretty well bear out this conclusion."

The single remark which was made by the trial court in the presence of the jury does not merit review of this case by this court, since on numerous other occasions the trial court was solicitious of petitioner's counsel and the remark did not reflect on the merits of petitioner's case. In *Kokatsu* v. *United States*, 351 F. 2d 898, 904 (9th Cir. 1965), the court found remarks that "did not convey to the jury any impression of the guilt or innocence of appellant or impugn the integrity of either counsel" were not prejudicial error, especially since, "the court admonished the jury to disregard any comment which might in-

dicate his opinion regarding the case." In *United States* v. *Ross*, 321 F. 2d 61, 66 n. 3 (2nd Cir. 1963), cert. denied, 375 U.S. 894, 84 S. Ct. 170 (1964) 11 L. Ed. 2d 418, the Court found no error when the judge's remarks ". . . did not reflect on the defendant's case so much as on the way it was being handled."

The trial court in this case instructed, "I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything I have done or said has seemed to so indicate, you will disregard it." (T. 900)

The comment made by the Court in the presence of the jury when viewed in perspective cannot be said to amount to prejudicial ridicule but could be considered irritation with defense counsel. In *Walker* v. *Bishop*, 408 F. 2d 1378 (8th Cir. 1969), the Court found that irritation does not constitute reversable error.

This case is similar to *United States* v. *Liss*, 137 F. 2d 995, 999 (2nd Cir. 1943) cert. denied, 320 U.S. 772, 64 S. Ct. 78, 88 L. Ed. 462 (1943) in which the Court stated: "In a trial which lasts for eight court days, and in which there are so many accused, a judge's serenity is often unduly tried by the persistence of counsel; no doubt perfection should be the standard, but if we were to insist upon it, few convictions could survive."

On the basis of the record, petitioner's claims that he was denied a fair trial by the actions of the trial judge is unsupportable. Therefore, respondent prays that this Honorable Court will deny the petition for certiorari.

II.

Petitioner's sentence does not present an important question of constitutional law.

The petitioner seeks to claim that the imposition of a life sentence in his case constitutes a violation of the Eighth Amendment's prohibition against "cruel and unusual punishments."

The sentence imposed in this case is not "cruel in its excess of imprisonment. . . ." *Weems* v. *United States*, 217 U.S. 349, 377, 54 L. Ed. 793, 30 S. Ct. 544 (1910). ". . .[N]o one can deny that rape is one of the most morally reprehensible criminal offenses and, historically, the act has been the subject of the most severe penalties and public condemnation." *Rogers, supra*, S.W. 2d at 87.

Testimony in this case shows, contrary to petitioner's assertion, that the victim did suffer physical injury as a result of the rape. Dr. Douglas Smith, the gynecologist who examined the prosecutrix the night she was raped testified that her breasts were bruised and that the trauma would have been caused by pinching or biting. (T. 701 or 702). Also it is likely that the prosecutrix suffered psychological trauma due to being abducted at gun point, driven to a garage and raped.

The petitioner relied on the holding in *Workman* v. *Commonwealth*, 429 S.W. 2d 374 (Ky. Ct. of App., 1968) to support its claim that a life sentence in this case is cruel and unusual punishment. In a subsequent rape case, the same court in *Martin* v. *Commonwealth*, 493 S.W. 2d 714 (Ky. Ct. of App., 1973) found that a sentence of life without parole for a 24 year old was not cruel and unusual punishment.

The respondent respectfully submits that this Court should find that a life sentence for rape does not constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. The sentence in this case is not "so disproportionate to the offense committed as to shock the moral sense of the community." *Workman, supra,* at 377. Rape is a violent crime against the very personal dignity of the victim and a sentence of life imprisonment for the commission of the crime of rape in any case is not disproportionate to the offense committed.

CONCLUSION

WHEREFORE, for the reasons stated above, the Respondent respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert A. Newcomb, Assistant Attorney, do hereby certify that I have forwarded two (2) copies of the Brief for Respondent In Opposition to Mr. George Howard, Jr., 329½ Main Street, Pine Bluff, Arkansas 71601, and one copy to Mr. Nathaniel R. Jones, James I. Meyerson and George E. Hairston, N.A.A.C.P. - 1790 Broadway, New York, New York 10019, by placing same in the United States mails, postage prepaid this 26th day of March, 1975.

/s/ Robert A. Newcomb
ROBERT A. NEWCOMB
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